TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1916

No. [redacted]274

J. D. COLLETT, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FORD C. COTTEN, BANKRUPT, APPELLANT,

vs.

JAMES R. ADAMS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

FILED SEPTEMBER 18, 1917.

(26,151)

(26,151)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 684.

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vs.

JAMES R. ADAMS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 17, 1917.

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1 & 2 In the District Court of the United States for the Southern District of Texas, Holding Sessions at Galveston.

No. 32. In Equity.

J. D. COLLETT, Trustee of the Estate of Ford C. Cotten, in Bankruptcy,

vs.

JAMES R. ADAMS.

Be it remembered, That in the above entitled and numbered cause, lately pending in said Court, in which final judgment was rendered at the Regular June Term, 1917 of said Court, to-wit, on the 19th day of June, 1917, the Honorable Waller T. Burns, Judge of the District Court of the United States for the Southern District of Texas, presiding, the following proceedings were had and taken in said Court, to-wit:—

3 *Plaintiff's Petition.*

Filed May 12, 1917.

In the District Court of the United States for the Southern District of Texas, Sitting at Houston.

No. 32. In Equity.

J. D. COLLETT, Trustee of the Estate of Ford C. Cotten, in Bankruptcy,

vs.

JAMES R. ADAMS.

To the Judge of the District Court of the United States for the Southern District of Texas:

A.

The plaintiff, J. D. Collett, Trustee of the Estate of Ford C. Cotten in Bankruptcy, complains of the defendant, James R. Adams, and says that he, the said Collett, has been appointed, and has qualified, as Trustee of the Estate of Ford C. Cotten, No. 964, pending in the United States District Court for the Northern District of Texas, Fort Worth Division. That he, the said Collett, is now acting as Trustee of said estate and is a resident citizen of Tarrant County, Northern District of Texas. That James R. Adams is a resident citizen of Collin County, Eastern District of Texas, and resides in the City of Plano, in said County and State.

B.

That the Honorable W. B. Paddock, Referee in Bankruptcy for the Northern District of Texas, Fort Worth Division, and before whom the proceedings in the estate of Ford C. Cotten have been referred, has authorized and instructed your plaintiff to bring this suit.

That this suit is brought under Section 70, Sub-division E,
4 of the Bankruptcy Act of 1898, and as amended by the Act of 1903.

C.

1. Petitioner would show to the Court that on or about December 22nd, 1916, the bankrupt, Ford C. Cotten, was the owner in fee simple and was in possession of the following described property, to-wit:

1. Tract or parcel of land in Wharton County, Texas, described as follows: 500 acres out of the Richard Boatright survey, beginning at an iron pipe set on the West side of 30 foot graded road, same being north 73 degrees East 2,348.81 varas and south 16-47 East 1,969.9 vrs. from the N. W. corner of said Boatright league, the same being the N. W. corner of this tract: thence North 73 East 1,976.8 varas to the center of Middle Bernard Creek from which an iron pipe set on the West bank of said Creek bears South 73 West 8 varas: thence down said Creek with its meanders to the S. E. corner of this tract; thence south *south* 73 West 2,067.8 varas with the south line of this tract same being the south line of lot #2 of the Westmoreland subdivision said league; thence north 72-59 West 108 varas with the *the* north line of the Nottawa and East Bernard public road to stake for corner; thence North 16-47 west at 1,039.3 varas passing the N. W. corner of said Lot #2, same being the S. W. corner of Lot #3 of said subdivision and continuing said course 1,374.1 varas in all to an iron pipe and place of beginning and being the same land described in deed from E. W. Way, Ella A. Way and C. C. Way to Chesley Smith, dated 13th day of November, A. D. 1913, here referred to for description of said land.

2. Situated in Wharton County, Texas, and out of the Richard Boatright league Beginning at a point in the middle of *a* Bernard Creek as ascertained by a survey, made in accordance with
5 an agreement between Elmer E. Foley and E. W. and C. C. Way; thence following the meanderings of said Bernard Creek north to a corner of said creek from which a pin oak marked J. bears south 95.5 east 29 feet or 10.5 varas; thence south 73 West with the South line Meilsch Bros. 219 varas to their S. W. corner; thence northward with the West line of said Meilsch Bros., tract 501 varas to their N. W. corner in the South line of the J. C. Senkel tract; thence south 73 West with J. C. Senkel's line 301 vrs. to his S. W. corner; thence Northward with his West line 804 varas more or less, to his N. W. corner to a large Cypress post in the north line of said Boatright league; thence south 73 West at 140 varas a creek at 500 varas a creek at 1,365 varas to the N. E. corner of a 1,000 acre tract of land conveyed to Ayres & Graybill by Stockton & Leveridge;

thence south 6¾ along the East line of said 1,00- acres tract to the N. W. corner of a 500 acre tract described in deed from E. W. & Ella W. Way and C. Way to Chesley Smith, thence running East along the north boundary line of said 500 acre tract to place of beginning, containing in all 569.8 acres more or less, in second tract, and 500 more or less in the first tract being a total in all 1,069.8 acres more or less hereby conveyed.

2. That the defendant, James R. Adams, sued Ford C. Cotten in the District Court of Collin County, Texas, in a suit styled No. 7702, James R. Adams, plaintiff, vs. Ford C. Cotten, et al. That said suit was for the sum of $45,311.00. That said James R. Adams did allege that he had traded to said Ford C. Cotten the above described land and premises for certain lands located in Perry County, State of Kentucky, and that said Cotten did not deliver title to said Kentucky lands, and that he, the said Adams had been deceived and defrauded to the extent of $45,311.00, being the net market value of the
6 Wharton County lands.

3. That the said Ford C. Cotten was at the time of the institution of the suit in Collin County, Texas, and at all times since, a resident of Tarrant County, Texas.

4. That said James R. Adams did cause a writ of attachment to be issued on this unliquidated claim and had same levied upon the above described land and premises and upon all crops and personalty located thereon as the property of said Cotten. That said attachment was issued and levied during the month of August, 1916, and that said Cotten was the owner of said property at the time of the aforesaid levies.

5. That during said month of August, 1916, the bankrupt, Ford C. Cotten, was within the State of Texas, a fact known to the defendant, Adams, and he, the said Adams, secured service of citation upon said Cotten.

6. That said aforementioned suit in Collin County, Texas, was pending on December 22nd, 1916, and on said date the bankrupt, Ford C. Cotten, and the defendant, James R. Adams, made a settlement of said suit, which said settlement was in writing. By the terms of said written agreement said Cotten waived any and all rights which he had to any of the crops grown on, or the revenue to be derived from the 1,070 acres of land situated in Wharton County, Texas, and upon which writs of attachment had been levied, and he did agree to transfer to said Adams all of said crops, or the proceeds thereof, and all revenue derived from said farm for the year 1916, and did further agree to reconvey to said Adams and vest in him the title and possession of all said personal property on said farm except the seed rice planted in 1916, and said Cotten did further agree to make, execute and deliver a Special Warranty Deed to James R. Adams exe-
7 cuted by the Bankrupt and his wife to the said 1,070 acres of land above described. From the proceeds of the crops for the year 1916 was to be deducted the amount of judgment obtained by the Frank Stevens Company, and a mortgage aggregating $2,000.00 held by one, T. B. Butler, and a laborers' lien held by one A. L. Welch, for approximately $332.00. After paying the afore-

mentioned claims the defendant, Adams, was to have the balance and said balance was to be paid into the registry of the District Court of Collin County, Texas. It was further agreed that said Adams was to go in full possession of said land.

7. Said agreement contained the following stipulation: "It is further stipulated and agreed that four months after the deed from F. C. Cotten and wife to James R. Adams is filed for record, and four months after the execution of the terms of this contract, if no petition in bankruptcy has been filed against said F. C. Cotten, either voluntarily or involuntarily, that said James R. Adams will dismiss the above mentioned suit and pay all unpaid costs, and the said James R. Adams agrees to file the deed from F. C. Cotten and wife to him for record in Wharton County immediately upon receipt of same; and if such proceedings be filed and said F. C. Cotten be not adjudicated a bankrupt upon hearing, then this agreement shall be binding and said cause dismissed.

It is further stipulated and agreed that in the event bankruptcy proceedings, either voluntary or involuntary, be had seeking to declare said F. C. Cotten a bankrupt, then and in that event said James R. Adams shall prosecute his suit to judgment, retaining all attachment and garnishment liens heretofore acquired, and that in the event he gets a judgment, said attachment liens may be foreclosed on all of said premises, and any net sum or sums received
under this agreement, for his own use or that may be paid
8 into the registry of the District Court of Collin County, shall be credited upon any judgment which he may recover."

8. Pursuant to said agreement aforementioned, the bankrupt, Ford C. Cotten and his wife, Gertrude Cotten, did execute and deliver their Special Warranty Deed to the defendant, James R. Adams, to the land and premises above described and located in Wharton County, Texas, said deed being executed under date of December 22nd, 1916, and filed for record in Wharton County, Texas, December 27th, 1916.

9. That said bankrupt, Ford C. Cotten, did deliver all the personal property of whatsoever nature located upon said real estate and the crops growing thereon to the defendant, James R. Adams.

10. That the defendant, James R. Adams, did take possession of said land, premises, crops and personal property aforementioned and is now in possession of same, claiming title thereto.

11. That neither the said bankrupt, Ford C. Cotten, nor the defendant, James R. Adams, recorded the agreement of settlement made and entered into under date of December 22nd, 1916, before the petition for adjudication in bankruptcy was filed, nor before the adjudication was had.

12. That there is now in the registry of the District Court of Collin County, Texas, the sum of $4,457.73, which said money was deposited there by the defendant, Adams, as being the net amount left from the sale of the crops after paying the claims which the bankrupt, Ford C. Cotten, had agreed might be deducted.

13. That your petitioner does not know the gross amount derived from the sale of the crops, or the total amount deducted. That the

matter was entirely in the hands of the defendant, James R. Adams, his attorneys and representatives, and the sheriff of Wharton
9 County, acting under the directions of said James R. Adams, his attorneys, agents and representatives.

14. Your complainant would further show to the court that on the 17th day of March, 1917, an involuntary petition — bankruptcy was filed against the bankrupt, Ford C. Cotten. That said Ford C. Cotten did confess his bankruptcy and was, on March 23rd, 1917, duly adjudged a bankrupt, and on April 28th, 1917, your petitioner was appointed Trustee.

15. Complainant would show to the court that on December 22nd, 1916, the said Ford C. Cotten was insolvent, and by the transactions aforementioned he did intend to create a preference in favor of the said James R. Adams. That said Adams did know, and did have reasonable cause to believe that said Cotten was insolvent, and that the intention was to create a preference. That said transfer was based upon, if anything, an antecedent consideration and was made within four months preceding the filing of the petition in bankruptcy, and that the property above described and located in Wharton County, Texas, was and is non-exempt property of said Ford C. Cotten and was such property as the creditors of said Ford C. Cotten had a right to have subrogated to their said claims. That said transfer to said Adams was fraudulent, and that a preference has resulted as there are not sufficient assets to pay all creditors.

16. That your petitioner is informed and believes said Wharton County land above described is of the reasonable net market value of $20,000.00.

17. That your complainant is a lien creditors and a bona fide purchaser for value of the Wharton County land and premises above described. That the agreement between the said Ford C. Cotten and said James R. Adams that the Collin County suit was not to be dismissed until after four months was a secret understanding be-
10 tween said parties. That your complainant is not chargeable with notice thereof. That said attachment lien was, under the laws of Texas, void and of no effect. That if it ever was a valid lien it was merged into the Special Warranty Deed and has been satisfied. That if same was ever a valid lien that part of the agreement between said Ford C. Cotten and said James R. Adams which endeavors to preserve said lien at the time of settlement was void, unenforceable, constitutes fraud on the rights of third parties and creditors and was without consideration. That said agreement was an attempt to oust the jurisdiction of this court and was a fraud thereon.

18. Your complainant would show to the court that said James R. Adams is now in possession of the said land and premises. That he has demanded of the said Adams that he surrender him the said premises, but, although often requested to do so, he has hitherto failed and refused. That said Adams has placed tenants on said property and is preparing the soil for crops. That a large acreage of said farm is used for the cultivation of rice. That said Adams is making advances to his tenants, so petitioner is informed and believes, which said advances will be secured by a mortgage on the

crops, and is otherwise exercising ownership of said property and using the fruits and revenue thereof to his own use and benefit. That said Adams is giving directions and instructions to said tenants as to the cultivation of said soil and your complainant here alleges on information and belief that said Adams is mortgaging the crops and personalty of said estate and will likely dissipate the crops, or the profits thereof, for this year unless a Receiver is placed in charge pendente lite to hold matters in status quo.

11 19. That the suit above referred to as having been filed in the District Court of Collin County, Texas, is still pending and is on the docket thereof, and your complainant has demanded of said James R. Adams, and his attorneys, that they do cause said suit to be dismissed, but that said demand has not been complied with, and they are now threatening to go forward with said suit and thus interfere with the proceedings of the bankruptcy Court and jeopardizing the custody of the property.

D.

Wherefore, complainant prays the court that pendente lite a Receiver be appointed to take charge of the farm with authority to prepare the soil for the crops of this year, sub-let the premises to tenants upon terms usual to the business and in conformity with the laws of Texas, and to manage the farm, and for such other orders as your Honor may give. That said James R. Adams, his agents and representatives, be restrained from proceeding with the said suit aforementioned in Collin County, Texas, and that a temporary injunction be granted pending a hearing. Complainant further prays that upon final hearing that he have an accounting as to the disposition of the proceeds of the personal property heretofore delivered by said Cotten to defendant Adams, and that it be ordered and decreed that your complainant have title and possession of said land and premises, or a judgment for its value in the sum of $20,060.00. That he have judgment for the amount of the personal property and crops sold and disposed of less all lawful charges, and that the alleged attachment liens obtained in Collin County, Texas, and which defendant is now asserting, be cancelled and held for naught. That plaintiff has no adequate remedy at law and if such relief as prayed for be not granted he will be irreparably injured,

12 and for such other and general relief as may to the court be deemed just.

HUNT & TEAGLE, *of Houston;*
SEAY & SEAL, *of Dallas,*
Solicitors for J. D. Collett, Trustee in Bankruptcy of the Estate of Ford C. Cotten.

STATE OF TEXAS,
County of Harris:

Personally appeared H. B. Seay and says that he has read the foregoing petition and has knowledge of the allegations therein set up

and knows the contents thereof are true except as to matters therein stated on information and belief, and as to these matters he believes them to be true.

H. B. SEAY.

Sworn to and subscribed before me, this, the 10th day of May, A. D. 1917.

[SEAL.]

A. T. CARLETON,
Notary Public in and for Harris County, Texas.

(Indorsements:) No. 32, In Equity. J. D. Collett, Trustee of the Estate of Ford C. Cotten in Bankruptcy, vs. James R. Adams. Plaintiff's Bill. Filed May 12, 1917. L. C. Masterson, Clerk. By G. Predecki, Deputy.

13 *Subpœna in Chancery.*

Issued May 12, 1917, with Marshal's Return thereon.

UNITED STATES OF AMERICA:

District Court, Fifth Circuit, and Southern District of Texas.

The President of the United States of America to James R. Adams, Greeting:

You are hereby commanded to appear personally before the Honorable District Court of the United States, for the Southern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Galveston, in and for said District, twenty days after issuance hereof, or whensoever the said Court shall be there, to answer a Bill exhibited against you By J. D. Collett, Trustee of the Estate of Ford C. Cotten in Bankruptcy, filed May 12, 1917, and to do further and receive what the said court shall have considered in that behalf.

Witness, The Honorable Waller T. Burns, Judge of said Court, and the Seal of the District Court of the United States, for the Southern District of Texas, at the City of Galveston, this 12th day of May, Nineteen Hundred and Seventeen, and of the Independence of the United States of America the 141st year.

[SEAL.]

L. C. MASTERSON,
Clerk U. S. District Court,
Southern District of Texas,
By G. PREDECKI, *Deputy.*

The Defendant James R. Adams is required to file his answer or other defense in the above suit in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the Bill may be taken as confessed.

[SEAL.]

L. C. MASTERSON,
Clerk U. S. District Court,
Southern District of Texas,
By G. PREDECKI, *Deputy.*

14 *Directions to Marshal.*

The Bill alleges that the defendant is a resident of Plano, Collin County, Texas.

Marshal's Return.

Received this writ on the 17th day of May 1917 at Sherman, Texas. Executed it on the 18th day of May 1917 by delivering a certified copy of this writ to the within named James R. Adams, in person at Plano, Collin County, Texas. B. F. Sherrell, U. S. Marshal. By J. L. Satterfield, Deputy.

(Indorsements:) United States District Court, Southern District of Texas. Ch. No. 32. J. D. Collett, Trustee of the Estate of Ford C. Cotten in Bankruptcy vs. James R. Adams. Subpœna in Chancery. Issued May 12th, 1917. L. C. Masterson, Clerk. By G. Predecki, Deputy. Returned and filed 23rd day of May, A. D. 1917. L. C. Masterson, Clerk. By G. Predecki, Deputy.

15 *Motions Questioning Jurisdiction and Answer of Defendant James R. Adams.*

Filed June 6, 1917.

In the District Court of the United States for the Southern District of Texas, Sitting at Galveston.

In Equity.

No. 32.

J. D. COLLETT, Trustee of the Estate of Ford C. Cotten, in Bankruptcy,

vs.

JAMES R. ADAMS.

To the Judge of the District Court of the United States for the Southern District of Texas:

(*a*). The Plaintiff's bill shows upon its face that this Court has no jurisdiction of the subject matter involved in the bill in this: Said Bill shows upon its face that at the time of the commencement of this suit, and at the time the service of the writ of subpœna issued thereunder, was made upon this defendant, another suit was and at all times herein mentioned has been, and is now pending in the District Court of Collin County, State of Texas, Number 7702, between the said James R. Adams, and the said Ford C. Cotten, et

al, involving the same subject matter and wherein similar relief is sought.

That said Bill shows that the suit pending in the District Court of Collin County, Texas, as aforesaid is for the sum of Forty-Five Thousand, Three Hundred, and Eleven Dollars, ($45,311.00),
and that in said suit a writ of attachment was issued and
16 levied upon the lands, and premises described in said Bill,
to-wit: The Two tracts of land, consisting of 1069.8, acres, more or less, out of the Richard Boatright Survey, in Wharton County, Texas, together with all crops & property located thereon as the property of the said F. C. Cotton and said attachment was issued and levied during the month of August 1916, long prior to the filing of this bill, and more than four months before the filing of the petition in bankruptcy against said F. C. Cotten and before he was adjudicated a bankrupt.

First.

The Defendant, James R. Adams, does not consent to the adjudication of the matters complained of in Plaintiff's bill, in this Court, but objects thereto, and moves the Court to dismiss said bill for the want of jurisdiction.

Second.

And now comes the Defendant in the above styled cause, James R. Adams, and not waiving his objections to the adjudication of the matters set out in Plaintiff's bill in this Court, but insisting on the same, and files this his answer to said Bill, without prejudice to said objections and for answer says:

That this Court is without jurisdiction to hear and determine this case, because it appears from said Bill that the bankruptcy of Ford C. Cotten is pending in the District Court for the Northern District of Texas, in the Fort Worth Division. That the said James R. Adams, resides in Collin County, Texas, which is in the Eastern District of Texas of the United States District Court, and in the Sherman Division. That J. D. Collett, Trustee resides in Tarrant County, Texas, which is the Northern District of Texas, of the
United States District Court. Wherefore Defendant James
17 R. Adams, moves the Court to dismiss this bill for want of jurisdiction.

Third.

And not waiving his objections to adjudicating the matters complained of in said bill in this Court but insisting on the same and not waiving the objections to the jurisdiction of this Court, but insisting on the same. That the said Ford C. Cotten had been duly served in said suit and has appeared and answered therein, a certified copy of which answer therein is hereto attached marked Exhibit "D"

Said Bill further shows that the agreement for settlement was in writing, and made in said suit, that was pending in the District Court of Collin County, Texas, and that the matters and things complained of by Complainant, under and by virtue of said agreement of settlement in said suit, occurred under and by virtue of the terms of such settlement so alleged to have been made between said Cotten and Defendant herein.

That said Bill, upon its face, shows that the District Court of Collin County, Texas, a Court of competent jurisdiction had acquired jurisdiction of the subject matters involved herein long prior to the filing of the bill herein, and that such suit is still pending and is now at issue, and that adequate relief may be had by the parties hereto therein.

Wherefore this Defendant prays that this action be dismissed for want of jurisdiction.

—ing on the same, the defendant James R. Adams, if required so to do, here now files his answer to plaintiff's bill, without prejudice to his motion to dismiss said bill for want of consent and for want of jurisdiction. And for such answer says:

18 Fourth.

Defendant admits the facts set forth in paragraph "A" of said bill.

Fifth.

That this defendant is not informed as to the matters and facts set forth in paragraph "B" of said bill.

Sixth.

This defendant denies the matters and facts set forth in paragraph "C" of said bill.

Seventh.

This defendant admits that he did sue Ford C. Cotten, the Perry Coal and Lumber Company and Daniel Hewitt in the District Court of Collin County, Texas Cause No. 7702 for Forty-five Thousand Three Hundred and Eleven Dollars, but denies that he did allege that he had traded with said Ford C. Cotten the land described in plaintiff's bill; on the contrary he did allege in said petition that the said Perry Coal and Lumber Company, a foreign corporation, was to take said land described in plaintiff's bill in exchange for 5000 acres of land which the said Perry Coal & Lumber Company claimed to own in the State of Kentucky. That he did allege in said petition that Ford C. Cotten was acting as the agent for the Perry Coal & Lumber Company a foreign corporation, and he did allege that the said Ford C. Cotten conspired with said Perry Coal & Lumber Company, O. A. Sears, W. N. Cope and

Daniel Hewitt to defraud this defendant out of the land described in plaintiff's bill and that this defendant did make a deed to F. C. Cotten, as Trustee for the Perry Coal & Lumber Company, the land described in plaintiff's bill. That a certified copy of plaintiff's petition in Cause No. 7702 in the District Court of Collin County, Texas, James R. Adams v F. C. Cotten, Perry Coal & Lumber
19 Company and Daniel Hewitt is here attached to this answer marked Exhibit "A," referred to and made a part of this answer. And that the said Ford C. Cotten, after being duly cited, has appeared in said cause and answered in said cause.

Eighth.

This defendant admits the facts set forth in paragraph 3 of plaintiff's bill.

Ninth.

This defendant denies that his claim against Ford C. Cotten the Perry Coal & Lumber Company and Daniel Hewitt was an unliquidated claim as set out in paragraph 4 of plaintiff's bill. This defendant admits that he caused a writ of attachment to be issued and levied upon the lands described in plaintiff's bill and upon divers and sundry other tracts of land in different counties in the State of Texas and that he did cause attachments to be issued and levied upon certain crops and personal property located on the lands described in plaintiff's petition. That said attachments were duly levied and duly entered of record in the office of the County Clerk of Wharton County, Texas where said lands were situated as described in plaintiff's bill and were duly entered of record as required by law in other counties where said land was attached and a valid and subsisting attachment lien was thus secured by this defendant on all of the lands described in plaintiff's bill and on all of the personal property as will be shown by certified copies of said writs of attachment hereunto attached marked Exhibit "B" and referred to and adopted as a part of this answer. But this defendant denies that he levied upon all crops located on said land as the
20 property of the said Ford C. Cotten; but on the contrary, says that the same was levied upon all of said property as the property of the Perry Coal & Lumber Company and this defendant denies that any of said property either real or personal was the property of Ford C. Cotten, but alleges in truth and in fact that it was the property of the Perry Coal & Lumber Company and that all of said property was procured through fraud by the Perry Coal & Lumber Company and the fraud perpetrated upon this defendant by the said Ford C. Cotten and others.

Tenth.

This defendant admits the facts stated in paragraph 5 of plaintiff's bill.

Eleventh.

This defendant denies that he made a settlement of said suit pending in the District Court of Collin County, Texas with Ford C. Cotten on December 22, 1916, but admits that this defendant and Ford C. Cotten did agree upon terms by which a settlement of said suit was to be made; that said contract is in writing and a substantial copy thereof is hereunto attached marked Exhibit "C," referred to and made a part of this answer and in this connection this defendant further alleges that this defendant upon discovery that a fraud has been perpetrated upon him by the Perry Coal & Lumber Company, through a conspiracy of the said Perry Coal & Lumber Company, Ford C. Cotten, Daniel Hewitt, O. A. Sears and W. N. Cope he immediately filed this suit against the said Ford C. Cotten, Perry Coal & Lumber Company and Daniel Hewitt for the sum of $45,311.00, the amount which this defendant claims he had been defrauded out of on the implied promise of said Perry Coal
21 & Lumber Company, Ford C. Cotten and Daniel Hewitt to repay the plaintiff James R. Adams the amount of which they had defrauded him, and sued out the several attachments on certain lands and personal property as will be shown by Exhibits hereto attached and marked exhibits — which are referred to and made a part hereof, by virtue of which said writs of attachment all of which had been duly recorded as required by law by virtue of which the plaintiff in said suit James R. Adams secured a valid and subsisting attachment lien to secure the payment of his said debt so sued upon more than four months before the filing of the petition in bankruptcy of the said Ford C. Cotten. That long before the 22nd day of December, 1916 when said agreement was entered into the said Ford C. Cotten and this defendant had agreed upon the terms of settlement of said suit which agreement was made more than four months before the petition in bankruptcy was filed against the said Ford C. Cotten and at the time of said agreement the said Ford C. Cotten offered to deed said land back to this defendant and this defendant refused to accept his deed on the ground that the record disclosed that the title to said land was in the Perry Coal & Lumber Company and demanded that in carrying out the settlement that the said Ford C. Cotten should procure this defendant a deed to the land described in plaintiff's bill to this defendant from the Perry Coal & Lumber Company. And the said F. C. Cotten for reasons of his own objected to procuring a deed from Perry Coal & Lumber Company direct to this defendant, but stated that he would get a deed from Perry Coal & Lumber Company to him the said F. C. Cotton and that he would immediately convey said land to this defendant; that the said F. C. Cotten did
22 procure a deed from the Perry Coal & Lumber Company to himself to said land and did in pursuance of said agreement previously made and the written agreement entered into on the 22nd day of December, 1916 convey said land to this defendant. That the terms of said contract entered into on the 22nd day of December, 1916, was intended to be and in fact was a recision of

the original contract under and by virtue of which this defendant was defrauded. That under the terms of said contract the said Perry Coal & Lumber Company and the said Ford C. Cotten had returned to them the entire consideration that they gave to the said Adams for the lands and personal property described in plaintiff's bill. That the said Adams had furnished $1250.00 worth of seed rice to grow the crop on said land in 1916; he had furnished the teams and tools to cultivate said crop and had furnished the feed to feed said teams and by the terms of said contract he assumed to pay off the Stevens judgment amounting to more than $2000.00 which judgment was for supplies furnished in making the crop on said land; he also assumed to pay off and discharge all contracts for labor and laborer's liens in making said crop and he in turn was to receive all the crops grown on said land and rents from said land which the Perry Coal & Lumber Company or F. C. Cotten would have received but for said contract; that in addition to said sums he agreed to pay off and discharge a mortgage debt of Two Thousand Dollars which had been placed on said property by the said Ford C. Cotten and which was then held by one Tom Butler of Tyler, Texas; and that he has paid off and discharged $966.00 of said mortgage debt and has given his personal obligation for the balance of said $2000.00 debt; said Adams also lost in
23 said settlement one house and lot in the City of Tyler, Texas, which he had given to said Daniel Hewitt as commissions for negotiating said sale and exchange; at the time he paid said commissions he did not know that the said Daniel Hewitt was the agent for the said Perry Coal & Lumber Company or the said Ford C. Cotten; and did not know that the said Daniel Hewitt was a party to the conspiracy with the Perry Coal & Lumber Company, Ford C. Cotten and others to cheat and defraud him the said Adams. That by the terms of said agreement said Adams was to re-convey to the Perry Coal & Lumber Company the 5000 acres of land that had been conveyed to him by the said Perry Coal & Lumber Company and was to surrender to the said F. C. Cotten his certain promissory note for the sum of $477.00 payable to James R. Adams together with a collateral bond for Five Hundred Dollars attached thereto. That said 5000 acres of land and said promissory note of said F. C. Cotten was the entire consideration moving from the Perry Coal & Lumber Company and F. C. Cotten to the said James R. Adams for the 1070 acres of land and the personal property thereon. And the said James R. Adams stands ready able and willing to carry out his part of the said undertaking upon the disposition of the suit in Collin County as provided for in said contract. That a copy of said contract is hereunto attached marked exhibit "D" and the same is adopted and made a part of this answer.

Twelfth.

Defendant admits the matters and facts set out in paragraph 8 of plaintiff's bill.

Thirteenth.

Defendant denies the matters and facts set out in para-
24 graph 9 of plaintiff's bill. On the contrary he avers that all of the crop consisting of rice and cotton that was grown on said place by hired labor was attached by the said Adams in the cause filed in the District Court of Collin County, Texas and that said rice and cotton was by the Sheriff of Wharton County sold by order of the District Court of Collin County, Texas and by order of said Court the proceeds of the sale of the same less the cost of executing the writ was deposited in the registry of the District Court of Collin County, Texas to abide the orders of said Court and said sums amounting to approximately *to* Forty-five Hundred Dollars is still held by said Court in the registrry of the Court to abide the orders of the Court upon the trial and disposition of said cause. That the said James R. Adams did receive an order from said Cotten to A. W. Caylor and T. A. Smith who were tenants on said 1070 acres of land and who cultivated the same for a part of the crop for the amount due by them for the rents which was approximately $3400.00; that judgment had theretofore been rendered in favor of the Frank Stevens Company against F. C. Cotten foreclosing a mortgage on the crop grown on said premises which judgment was for advances and supplies furnished in making said crop. The Frank Stevens Company in said suit had garnished the said A. W. Caylor and T. A. Smith and recovered a judgment against them for the amount of its judgment. That in pursuance of the agreement entered into by the said Cotten and Adams the said Adams collected said sum of to-wit: $3400.00 and paid off and discharged the Frank Stevens judgment and costs and applied the balance of the amount of said $3400.00, amounting to $966.00 as a payment on the mortgage note held by Butler against the personal property on said premises. That the said James
25 R. Adams has never received any sum from said crop, but his executed his personal obligations continuing the mortgage of said Butler note against the six mules which were a part of the personal property involved in this transaction and the balance due on said mortgage note secured by said six mules including interest is about $1100.00 which is more than the value of said mules.

Fourteenth.

This defendant denies that part of paragraph 10 which alleges that he took possession of the crops, but admits that he has possession of the land and other personal property. He denies that he is claiming title thereto, that is, to said land and other personal property, except such title as he holds by virtue of said agreement entered into with Cotten, subject however in the event said agreement is not carried out to his right to foreclose his attachment lien on said property and on the proceeds deposited in the registry of the District Court of Collin County, Texas.

Fifteenth.

The defendant admits that he did not record nor have recorded the agreement entered into by him and F. C. Cotten, except insofar as the deed to the 1070 acres of land was concerned which was promptly recorded. But this defendant avers that he did have recorded in Wharton County, Texas where said land is situated in the proper office his proceedings in attachment as required by law.

Sixteenth.

Defendant denies the allegation in paragraph 12 of plaintiff's bill and on the contrary he avers that said sum of Four Thousand Four Hundred and Fifty-seven and 73/100 Dollars deposited in the registry of the District Court of Collin County, Texas was de-
26 posited there by the Sheriff of Wharton County, Texas as the proceeds of the rice and cotton he had theretofore attached in said cause, having sold the same by an order of the District Court of Collin County, Texas and deposited the proceeds of the sale as ordered by the Court to abide the further order of said Court.

Seventeenth.

This defendant denies that part of paragraph 13 of plaintiff's bill which alleges that the matter was entirely in the hands of the defendant James R. Adams, his attorneys and representatives and the Sheriff of Wharton County, acting under the direction of the said James R. Adams his attorneys, agents and representatives. But avers on the contrary that said Sheriff acted under the order of the District Court of Collin County, Texas and that said sum of money so deposited in the registry of *of* Court was never at any time and is not now subject to the order of the said James R. Adams, his attorneys agents or representatives, but that the same is in custodia legis to be disposed of by said Court upon the trial of said cause.

Eighteenth.

The defendant admits the allegations set forth in paragraph 14 of plaintiff's bill.

Nineteenth.

This defendant has no information and is not informed whether Ford C. Cotten was insolvent on the 22nd day of December, 1916. He denies that the transaction and agreement hereinbefore referred to that the said Ford C. Cotten did intend to create a preference in favor of the said James R. Adams and he denies that said James R. Adams intended to receive a preference. The said defendant denies that the said James R. Adams did know and did have
27 reasonable cause to believe that the said Cotten was insolvent and he denies that the intention was to create a preference.

He denies that said transfer was based upon an antecedent consideration, but on the contrary he avers by the terms of said contract Adams was to return the said Perry Coal & Lumber Company and to the said F. C. Cotten the total consideration the he had received for the said 1070 acres of land and the personal property thereon. And that said Adams received back the consideration that he had given to the Perry Coal & Lumber Company, F. C. Cotten and Daniel Hewitt, less the house and lot in Tyler which he had deeded to the said Hewitt and in addition thereto he assumed to pay off and discharge a $2000.00 mortgage placed on said property by the said F. C. Cotten including the six mules. That said mortgage has been partly discharged and paid off as hereinabove alleged and the said Adams has given his personal obligation to discharge the balance of it. He further avers and alleges that if the said F. C. Cotten ever owned the legal and equitable title to said property then under the terms of this agreement the estate of the said F. C. Cotten was entitled to the equitable estate in said 5000 acres of land in Perry County Kentucky and is entitled to the $500.00 bond held by the said Adams as collateral security to F. C. Cotten's said note for $477.00. That as a further consideration said Adams agreed to pay off and discharge said $200,000 mortgage placed on said property by the said Cotten and also release to the said F. C. Cotten one hundred and ten dollars that the said Adams had garnished in the hands of one J. H. Clegg, which said sum of money said Cotten received in cash. He denies that the above described property located in Wharton County, Texas was ever at any time the property of
28 the said F. C. Cotten; that the same was paid for, if paid for at all, by the Perry Coal & Lumber Company deeding said James R. Adams 5000 acres of land in Kentucky; that upon the execution of the deed from the Perry Coal & Lumber Company of the 5000 acres of land to James R. Adams, James R. Adams in consideration therefor, executed a deed and transferred the personal property to F. C. Cotten Trustee. That F. C. Cotten, Trustee for the Perry Coal & Lumber Company immediately without any authority from the Perry Coal & Lumber Company executed a deed to himself to said 1070 acres of land and only procured a deed to himself from the Perry Coal & Lumber Company for the purpose of conveying the said property to the said James R. Adams as stipulated in said agreement; that while said deed to himself from the Perry Coal & Lumber Company executed November 21st, 1916 was absolute on its face, the said F. C. Cotten held only as Trustee for the Perry Coal & Lumber Company, said land under said deed for the purpose of rescinding the contract theretofore made by the Perry Coal & Lumber Company and James R. Adams and for the purpose of settling the suit in the District Court of Collin County, Texas of James R. Adams v. Perry Coal & Lumber Company, F. C. Cotten and Daniel Hewitt. This defendant denies that said property was such property as the creditors of the said F. C. Cotten had a right to have subrogated to their claims. He denies that the transfer of said property to said James R. Adams was fraudulent; he denies that a preference has resulted; that he has no informa-

tion and is not informed as to whether or not F. C. Cotten has sufficient assets to pay all of his creditors, but avers that from his knowledge and information of said Cotten's method of conducting business, his habits, and necessary expenses that if the trustee can find all of his assets the trustee will have sufficient funds to pay all of said Cotten's debts; he denies that the net market value of the lands in Wharton County is $20,000.00; on the contrary he avers that at the time he traded said property to the Perry Coal & Lumber Company they took the same subject to a mortgage indebtedness of Eighteen Thousand Eight Hundred and Eighty Dollars, being the principal and accrued interest; that said sum of mortgage indebtedness was due and owing to H. P. Drought & Company of San Antonia, Texas and Chester Smith and —— —— Howell; that said mortgage indebtedness was secured by a deed of trust with power of sale upon default of payment of principal or interest empowering the trustee to sell the same upon twenty days notice to satisfy said indebtedness at the Court House Door in Wharton County.

Twentieth.

This defendant denies that the complainant is a lien creditor and bona fide purchaser for value of the Wharton County land and premises described; he denies that the agreement between the said Ford C. Cotten and James R. Adams that the Collin County suit was not to be dismissed until after four months was a secret understanding between the parties; on the contrary he avers that the agreement was for a fair and just settlement of said suit and that the same was in fact a rescission of the previous agreement and contract by the terms of which the said Perry Coal & Lumber Company and the said F. C. Cotten received back the identical property that they gave in consideration for Adams Wharton County Property and Adams received back his identical property with all expenses and charges thereon to be paid by Adams and in addition thereto Adams lost his house and lot in Tyler and agreed to pay off and discharge a two thousand dollar mortgage placed on said property by the said Cotten. He denies that said attachment lien was under the laws of Texas void and of no effect; and he avers that the same is still a valid and subsisting lien on said property and will remain so unless the terms of the agreement with said Cotten are carried out; he denies that said lien was merged in a special warranty deed and has been satisfied; but avers on the contrary if the same were merged in said special warranty deed that the same was a sufficient and valuable consideration and the plaintiff has no interest in said property; he denies that the endeavor to preserve said lien at the time of entering into the agreement was void or unenforceable he denies that the same constitutes fraud on the right of third parties and creditors, or that it was without consideration; he denies that said agreement was an attempt to oust the jurisdiction of this Court or was a fraud thereon, but on the contrary he avers that the same was a fair agreement by the terms of

which Adams received back nothing but his own property; he did not get all of that and that that he did get was encumbered; while the Perry Coal & Lumber Company and F. C. Cotten received back the identical property and all of it that they gave Adams for his said property.

Twenty-first.

The defendant admits the matters and facts set out in paragraph 18 of plaintiff's bill except that portion which alleges that he will dissipate the crop or the profit thereof and he avers that the only mortgage given on the crops and personalty is for the purpose of securing supplies and paying bills necessary to make said crops.

Twenty-second.

Defendant admits that part of paragraph 19 of plaintiff's
31 bill which alleges that the cause in Collin County is still pending and it is the purpose of the defendant unless enjoined by some proper tribunal and unless the terms of the agreement entered into with said Cotten are carried out to proceed with the prosecution of said suit and foreclose his attachment lien on the property attached.

Twenty-third.

He denies that there is a necessity for a receiver herein or that the complainants are entitled to a receiver and denies that he is entitled to the relief prayed for.

Twenty-fourth.

This defendant denies that he is guility of the wrongs and trespasses complained of in plaintiff's petition.

Twenty Fifth.

That the defendant herein has expended an amount of towit: Four Thousand and two hundred Dollars in furnishing seed, preparing the ground and for labor in planting the crop, to make the crop now on said premises for the year 1917 and has made permanent and valuable improvements on said land, paying taxes on said land all of which are betterments and enhance the value of the said estate;

That the greater part of said expenses were incurred and made prior to the filing of the petition in bankruptcy.

That he has paid off and obligated himself to pay off a mortgage of Two Thousand Dollars placed on said property by F. C. Cotten which was a legal charge against said estate; said mortgage having been placed on said premises and property by the said Cotten more than four months before the filing of said petition in bankruptcy

and said mortgage was duly registered and recorded for more than four months before the filing of said petition in bankruptcy.

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Twenty Sixth.

Wherefore this defendant prays that having duly answered herein under oath, that plaintiff take nothing by his suit, and defendant go hence without day and in the event the Court should hold that it had jurisdiction to hear and determine the matter and things involved in plaintiffs bill, then that this defendant be protected in the amounts expended by him for the betterment and protection of said estate and in the discharge of said mortgage lien and for general, special and equitable relief.

W. R. ABERNATHY,
G. R. SMITH,
Solicitors.

I, James R. Adams defendant in the above styled and numbered cause being duly sworn on oath say that I have read over the above and foregoing answer and the matters therein stated as facts are true and those stated upon information and belief to be true are believed to be true.

JAMES R. ADAMS.

Subscribed to and sworn to before me this June the 5th 1917.
[SEAL.]
OWEN P. SMITH,
Notary Public Collin County, Texas.

33

EXHIBIT "A."

In the District Court of Collin County, Texas, September Term, A. D. 1916.

STATE OF TEXAS,
County of Collin:

To the Honorable M. H. Garnett Judge of said Court:

Now comes James R. Adams, hereinafter styled plaintiff, complaining of F. C. Cotten, Perry Coal and Lumber Company and Daniel Hewitt, and represents and shows to the court:

First.

That plaintiff resides in Collin County, Texas, and that defendant, Daniel Hewitt resides in Johnson County, Texas; that F. C. Cotten resides in Tarrant County, Texas; that Perry Coal and Lumber Company is a corporation duly incorporated under and by virtue of the statutes of the state of Kentucky and has its principal office and place of business at Lexington, Fayette County, Kentucky.

Second.

That F. C. Cotten is an agent of Perry Coal and Lumber Company and is the general manager of the said Perry Coal and Lumber Company in the State of Texas.

That the said Perry Coal and Lumber Company is doing business in the state of Texas.

That Daniel Hewitt of Cleburns, Johnson County, Texas is also an agent of the Perry Coal and Lumber Company.

Third.

That heretofore to-wit on the 15th day of March 1916 the plaintiff has possession of and owned in fee simple the following described tracts of land.

The First Tract situated in Wharton County Texas, and being
500 acres of land out of the Richard Boatright league Be-
34 ginning at an iron pipe set in the west side of a 30 foot graded road, same being north 73 degrees east 2346.81 varas and south 16-47 degrees east 1969.9 varas from the N. W. corner of the said Richard Boatright league, the same being the N. W. corner of this tract of land, * * * Thence North 73 degrees east 1976.8 var-s to the center of the middle of Bernard creek from an iron pipe set on the west bank of said creek bears south 73 degrees west 8 varas. * * * Thence down said creek with its meanders to the S. E. corner of this tract of land. * * * Thence south 73 degrees west 2067.8 varas with the south line of this tract, the same being the south line of lot #2 of the Westmoreland subdivision of said league. * * * Thence north 72 degrees 59′ west 108 varas with the north line of the Nottawa and east Bernard public road to a stake for corner. * * * Thence north 16 degrees 47′ west at 1039.3 varas passing the N. W. corner of said lot #2 same being the S. W. corner of lot #3 of said subdivision and continuing said course 1374.1 varas in all to an iron pipe and place of beginning, and being the same tract of land heretofore conveyed to grantor herein by James R. Adams of date April 1st, A. D. 1914 and recorded in Vol. 39 page 391 Deed Records of Wharton County, Texas; the said land is conveyed to said James R. Adams subject to and charged with the balance due on the series of V. L. Notes as shown in the above mentioned deed from Adams to Bowman.

The Second Tract is also a part of the Richard Boatright league of land in Wharton County, Texas, and Beginning at a point in the middle of Bernard creek as ascertained by a survey made in accordance with an agreement made between Elmer E. Foley and E. W. and C. C. Way.

Thence following the meanders of said Bernard creek north
35 to a corner in said creek from which a pin oak marked "J" bears south 95 degrees east 29 feet or 10.5 varas. * * * Thence south 73 degrees west with the south line of Meilsch Bros. 219 varas to their S. W. corner. * * * Thence northward with the west line of said Meilsch Bros. tract 501 varas to their N. W.

corner in the south line of the J. C. Senkel tract. * * * Thence south 73 degrees west with J. C. Senkels south line 301 varas to his southwest corner. * * * Thence northward with his west line 804 varas more or less to his northwest corner to a large cypress post in the north line of the said Boatright league. * * * Thence south 73 degrees at 140 varas a creek at 500 varas a creek at 1365 varas to the N. E. corner of a 1000 acre tract of land conveyed to Ayers and Graybill by Stockton and Leveridge. * * * Thence south 16¾ degrees east along the east line of said 1000 acre tract of land hereinabove set out and described as lot or tract #11. * * * Thence running easterly along the north boundary line of said 500 acre tract of land to the place of beginning and containing in all 569.8 acres of land more or less; said tract of land is conveyed subject to and charged with a lien to secure the balance of the debt mentioned in the deed from James R. Adams to J. K. Bowman Sr. recorded in Vol. 39 page 391 Deed Records of Wharton County, Texas.

Together with the following described personal property to-wit:

Inventory.

1	3 inch farm wagon 3½ inch tires complete	$60.00
1	grain rack	15.00
1	grain drill complete	135.00
2	steel dicks complete	70.00
2	16 foot steel harrows complete	50.00
2	Gany all steel plows	90.00
4	extra steel points for same	8.00
2	old 2-24 Gany disc plows	30.00
1	binder been used	50.00
1	new binder	175.00
22	singletrees	8.00

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6	3-4 & 2 horse double trees	8.00
12	sets of harness	38.00
8	extra good leather collars	27.00
16	extra collar pads	4.00
3	shovels	3.00
3	axes	4.00
1	round water tank for stock	12.00
1	large galvanized water tank at No. 2 place	30.00
2	large " round water tanks	70.00
3	field hoes	3.00
	Lot of lumber	10.00
1	roll 26", 1 roll 48" hog fence	30.00
2	house wells and pump complete	30.00
6	yale pad locks and chains	6.00
1	steel post drill	25.00
1	steel B. S. vise	12.00
1	bench vise	10.00

1	stock and dies complete	6.00
1	pipe stack and dies complete	25.00
2	pipe cutters ½ to 1½, 1½ to 3	6.50
1	pipe vise	3.00
4	14" Stillson wrenches	4.00
4	10–12–14 steel monkey wrenches	4.00
	job lot of small tools	10.00
	hatchets, hammers and saws	6.00
22	sheets galvanized corrugated iron roofing	16.00
1	levy push	20.00
4	engine wells pump complete with belt, batteries and magneta	9,500.00
4	supply pumps complete with belts, pipe and all connections	100.00
1	engine and pump belt and all complete	500.00
1	new well and curb in construction	450.00
3	young hogs	8.50
4	galvanized gasoline barrels	21.50
	pipes and connections to engine	13.50
4	gasoline pumps complete to pump gasoline to engine	21.50
6	good big mare and horse mules	1,800.00
1	gray mare with colt	150.00
1	bay mare in fold	150.00
1	small horse	75.00
241	barrels rice in warehouse on place	1,265.00
142	rice sacks	21.30
	corn, hay chops and bran	330.00
1	old separator worth	1,000.00
	Total	$16,511.00

Lot of other small old tools not listed or priced.

That the lands hereinabove described are of the fair and reasonable market value of $46,000.00, and the personal property hereinabove described is of the reasonable and fair market value of $16,511.00, that the aggregate value of the property was of the reasonable
37 and fair market value of $62,511.00; that the said lands were encumbered to the extent of $17,200.00, leaving a net value of the property to this plaintiff at $45,311.00.

That the said F. C. Cotten acting for himself and as agent for the Perry Coal and Lumber Company, and the said Daniel Hewitt acting for himself and as agent for the Perry Coal and Lumber Company, on or about the middle of February 1916, approached plaintiff knowing that he owned the property hereinabove described, and proposed to him to trade him 5,000 acres of land in the state of Kentucky hereinafter described, for the land of plaintiff hereinabove described, which said 5,000 acres of land the said Cotten and the said Hewitt for themselves and acting as agents for the Perry Coal and Lumber Company, represented that the same was owned in fee simple of the Perry Coal and Lumber Company, and was of the reasonable and fair

market value of $75,000.00, and that the said Perry Coal and Lumber Company had a good and perfect title to said land.

That said representations so made by F. C. Cotten for himself and as agent for the Perry Coal and Lumber Company, were made to plaintiff in Collin County, Texas.

That subsequent to the making of said representations the said F. C. Cotten acting as agent and trustee for the Perry Coal and Lumber Company, and plaintiff, herein entered into the following contract to-wit:

"This indenture made and entered into this the 29th day of February A. D. 1916, by and between F. C. Cotten of Denver, Colorado, trustee for the Perry Coal and Lumber Company of Lexington, Kentucky, party of the first part, and James R. Adams of Plano,
38 Texas, party of the second part, for and in consideration of One Dollar ($1.00) cash in hand paid, the receipt of which is hereby acknowledged, do enter in and make the following contract to exchange properties as hereinafter set forth to-wit:

The party of the first — agrees to deed or have deeded Five Thousand (5,000) acres of timber and coal land, with all minerals, in Perry County, Kentucky, free and clear of debt with abstract of title to date, and being a part of the W. J. Combs 69,600 acre survey in the northwest corner or westerly side.

The party of the second part agrees to deed or have deeded One Thousand & Seventy acres (1,070) of land in Wharton County, Texas, together with wells, pumps, tools, farm, machinery, seed rice, harness, wagons, six mules, four horses, feed, together with everything whatsoever on and being a part of the 1,070 acre farm known as the Adams farm in Wharton County, Texas. The party of the second part agrees to furnish abstract of title to date on said farm.

It is agreed and understood that party of the first part takes the 1,070 acre farm subject to encumbrances not to exceed $18,000.00.

It is agreed and understood that party of the second part hereby agrees to finish, equip and install one well with Fairbanks-Morse engine now in the course of construction and to pay for same.

The condition of this trade is that titles shall be merchantable, and fifteen days is given to complete abstracts and examine the same, and in case either title offered herewith has some defect then ten days' extra time shall be given for clearing said defect, and in case the party offering said title shall be unable at the end of 25 days from the date of this instrument to clear said title, the other
39 party to this contract may be written notice, declare this contract null and void.

Signed and entered into at Fort Worth, Texas, the day and year first above written.

F. C. COTTEN, *Trustee,*
Party of the First Part;
JAMES R. ADAMS,
Party of the Second Part.

Fourth.

That one O. A. Sears of Fayette County, Kentucky, is the legal statutory agent for the defendant Perry Coal and Lumber Company.

Fifth.

That one W. N. Cope of Breathitt County, Kentucky, is the agent and legally employed attorney and abstractor for the said Perry Coal and Lumber Company.

Sixth.

That by the terms of said agreement entered into by the said F. C. Cotten as agent and trustee for the Perry Coal and Lumber Company, the Perry Coal and Lumber was bound to deed or have deeded 5,000 acres of timber and coal lands with all minerals in Perry County, Kentucky, to James R. Adams and wife, free and clear of debt, with abstract to date, same being a part of the W. J. Combs survey of 69,600 acres in the N. W. corner or westerly side of said survey. And the said James R. Adams agreed to deed or have deeded 1,070 acres of land in Wharton County, Texas, together with wells, pumps, tools, farm machinery, seed rice, harness, wagons, six mules, four horses, feed, together with everything whatsoever on and being a part of the 1,070 acre farm known as the Adams farm in Wharton County, Texas, to Perry Coal and Lumber Co., field notes of said farm being herein described, and the said Adams agreed to furnish abstract of title to date on said farm.

It was further agreed that said Perry Coal and Lumber Company would take said farm of 1,070 acres subject to encumbrances not to exceed $18,000.00.

Seventh.

It was further agreed by said contract that the said Adams was to finish, equip and install one well with Fairbanks Morse engine, now in the course of construction, and to pay for same.

The condition of said agreement was that the title should be merchantable. That the said Cotten, Hewitt, Sears, and Cope, as agents and attorneys for the Perry Coal and Lumber Company were acting together and were jointly interested in the transaction, and that each for himself and as agent for the Perry Coal and Lumber Company, falsely and fraudulently represented to this plaintiff, that the title to the land contracted to be conveyed to this plaintiff was a good and perfect title, when they knew at the time said representations were made, and at the time said deeds were delivered, that said Perry Coal and Lumber Company did not have a merchantable title to said lands, and that its pretended title to same was wholly bad, and they knew that this plaintiff did not acquire any property by virtue of said deed of conveyance.

That these false and fraudulent representations were made with

the intent to deceive this plaintiff and did deceive him, and but for such false and fraudulent representations this plaintiff would not have conveyed his land and property hereinabove described to the said Perry Coal and Lumber Company.

41 That a conspiracy existed between the said Cotten, Hewitt, Sears, and Cope and divers other persons, many of whom are to this plaintiff unknown, to represent to the public at large and to this plaintiff in particular, that they had a good and perfect title to said lands in Kentucky amounting in the aggregate to 69,600 acres for *for* the purpose of defrauding and cheating whomsoever they might, this plaintiff in particular.

That in fact and in truth the said parties by said misrepresentations and by their acting together, have cheated a large number of Texas citizens with reference to titles and by means of said false representations with reference to said 69,600 acres of land.

That the said W. N. Cope as aforesaid falsely and fraudulently prepared and certified to a purported abstract of title to said lands, for the purpose of cheating and defrauding this plaintiff gave a purported opinion on this title to said land, that the title of same was good, when in fact and in truth said abstract of title furnished this plaintiff under and by virtue of the contract referred to, was not a true abstract of title, and the facts therein contained were falsely and fraudulently made for the purpose of deceiving, cheating and defrauding this plaintiff.

That this plaintiff did not know that the said W. N. Cope was the agent and attorney for Perry Coal and Lumber Company, but the said F. C. Cotten acting for himself and as agent for the Perry Coal and Lumber Company, falsely and fraudulently and with intent to deceive, cheat, and defraud said plaintiff, represented that W. N. Cope was a reputable and reliable attorney, who would give this plainriff an honest and fair opinion as to the title to said land.

This plaintiff did not know this W. N. Cope was the agent
42 and attorney for said Perry Coal and Lumber Company, and relied upon his opinion as to the title to said land, and was induced thereby to part with his title to his lands and property hereinabove described.

That this plaintiff did not know said Daniel Hewitt was agent for the Perry Coal and Lumber Company, when in truth and in fact said Hewitt was the agent and legal employee of said Perry Coal and Lumber Company.

That said Hewitt represented himself solely as a real estate broker, and assisted the said F. C. Cotten in cheating and defrauding this plaintiff. That this plaintiff upon the consummation of this deal hereinbefore set out, paid to the said Daniel Hewitt property of the value of $2,000.00, for his services in negotiating this deal.

Eighth.

That the abstract furnished to plaintiff by defendants herein, made out and certified to by the said W. N. Cope did not represent the title as it existed of record in Perry County, Kentucky, but the same was

fraudulently made; there was fraudulently omitted from the same many transfers affecting the title to said land, all of which facts were well known to all of the parties defendant herein, and the same was done in pursuance of the conspiracy on their part to cheat and defraud this plaintiff.

The said Cope was by the said Cotten represented to be an honest lawyer and one of ability to pass upon the abstract, but the said Cotten wholly withheld from this plaintiff that the said W. N. Cope was one of his co-conspirators and in the employ of the said Perry Coal and Lumber Company. Relying upon the representation so made by said Cotten, this defendant relied upon the opinion
43 of the title as expressed in the abstract and relied upon the abstract as being genuine, authentic and complete. But for the said fraudulent representation of the said Cotten with reference thereto, this plaintiff would not have accepted said abstract, nor would he have accepted the opinion of said Cope as to the title to said land.

Said representations were made for the purpose of deceiving this plaintiff and did deceive him, and but for which this plaintiff would not have parted with his title to his property.

Under the terms of this agreement of plaintiff with the said Cotten, the said Perry Coal and Lumber Company were to make this plaintiff a genuine warranty deed to said land. Said contract was drawn by the said Cotten, and he fraudulently omitted the said term from said contract, and this plaintiff did not discover the omission of same until after he had parted with his title to his land.

In pursuance of said agreement and contract, this defendant made, executed, and delivered to the said Cotten at Plano, Collin County, Texas, for himself and as agent for the Perry Coal and Lumber Company, a deed hereinafter described executed in due form of law the same being a genuine warranty deed as agreed to in their contract. He at the same time and place executed and delivered to him a bill of sale of the personal property hereinabove described.

That the said Cotten for himself and as agent for the Perry Coal and Lumber Company, received said deed and bills of sale in Collin County, Texas, and received the same in pursuance of the common design of all the defendants herein, and of O. A. Sears and W. N. Cope, and to cheat and defraud this plaintiff. That said deed
44 and bill of sale is in possession of defendants herein, and they are each notified to produce the same on trial, failing to do so secondary evidence will be offered.

Ninth.

That the said Cotten at the same time and place and as agent for the Perry Coal and Lumber Company, in pursuance of said conspiracy heretofore alleged, at that time delivered to this plaintiff and instrument in writing purporting to convey to this plaintiff and wife 5,000 acres of land in Kentucky, in accordance with the terms of said agreement, which said land is described as follows to-wit:

The following tract or parcel of land situated in the County of

Perry and State of Kentucky and on the waters of the North fork of the Kentucky river and bounded as follows to-wit: Beginning at the northwest corner of the W. J. Combs survey for 69,600 acres at a stake * * * Thence running with the line of the W. J. Combs survey east 17,500 feet to a stake * * * Thence running south 12445.7 feet to a stake and corner * * * Thence West 17500 to a stake in the line of the said W. J. Combs survey between the calls of the 4th and 5th corners of said survey * * * Thence north and with the line of the said W. J. Combs survey a distance of 12445.7/10 feet to the beginning corner, containing Five Thousand acres more or less." It being the northwest corner of said survey so as to include Five Thousand acres of same.

It being the same land conveyed by O. A. Sears by deed bearing date the 4th day of December 1913 unto the said Perry Coal and Lumber Company, which deed is recorded in the Perry County Court Clerks' office in deed book 28 at page 532.

That said instrument in writing was not the genuine war-
45 ranty deed as contracted for.

That this plaintiff is not learned in the law, and did not know until after he had parted with his title, that said instrument in writing was not a genuine warranty deed.

That he had confidence in said Cotten at that time and believed he was an honest and reliable man, and relied upon his representation that he should have a genuine warranty deed, and did not closely inspect said instrument and discover that it was not a genuine warranty deed, until long after he had parted with his title.

That he was deceived by the said Cotten and induced to accept a deed which might be construed, if properly authenticated, as a special warranty deed or as a quit claim deed.

Tenth.

Plaintiff charges that defendants have not in compliance with their contract, executed and delivered to him any deed whatever sufficient to convey to him the title or interest that the Perry Coal and Lumber Company had in and to said land, and that the same is absolutely void as a deed.

Eleventh.

Plaintiff further charges that said instrument was drawn in blank and acknowledged in blank, and that plaintiff's name was inserted, both in the body of said purported deed and in the acknowledgment of same, long after the acknowledgment was taken.

Plaintiff here now charges that said deed was purposely drawn in blank and acknowledged in blank for the purpose of cheating and defrauding any person whom defendants could succeed in cheating and defrauding.

46 Twelve.

This Plaintiff further represents to the court that in a settlement of the difference between the lands and the personal prop-

erty hereinabove mentioned, there was a balance of $577.00 due this plaintiff, for which said sum F. C. Cotten executed his promissory note of date of April 10th, 1916 due 60 days after date payable to this plaintiff at Plant, Texas, and as collateral to said note, he attached one certain purported bond of another fraudulent corporation, known as the Eureka Coal and Mineral Company, together with 18 interest coupons of $15.00 each hereto attached.

That said bonds were wholly worthless and a fraud, the same was executed by M. H. Courtney who is the president of the Perry Coal and Lumber Company, also purported to be the president of the Eureka Coal and Mining Company, and by O. A. Sears, secretary of the same. That F. C. Cotten is insolvent and said note is worthless.

Plaintiff here now tenders back into court said note and said bond to the defendant herein, or to whomsoever is entitled to the same. He here also tenders to this court a special warranty deed to the 5,000 acres of land attempted to be conveyed to this Plaintiff by the Perry Coal and Lumber Company, duly executed by plaintiff joined by his wife, to the defendant Perry Coal and Lumber Company. He here now offers to do and perform any and all other acts and things that equity and good conscience may require of him, or that this court may in the administration of justice call upon him to do and perform.

That all of the facts, statements, representations and declarations made by each of the defendants herein, by W. N. Cope and O. A. Sears in pursuance of their conspiracy to wrong, cheat and defraud this plaintiff, were each and all made for the purpose of de-
47 ceiving and defrauding this plaintiff, and did defraud and cheat him, and but for such fraudulent acts, statements, and declarations, this plaintiff would not have parted with his title to his property.

Thirteen.

Plaintiff further represents and shows to the court that defendants and each of them are justly indebted to this plaintiff in the sum of $45,311.00, and that Perry Coal and Lumber Company is a foreign corporation, and the Perry Coal and Lumber Company has disposed of its property, in part with the intent to defraud its creditors, and that the debt sued for is due for property obtained under false pretenses. That the debt sued for is due.

That this attachment is not sued out for the purpose of injuring or harassing the defendants nor any one of them.

And that the plaintiff will probably lose his debt unless such attachment is issued.

Fourteen.

That the plaintiff received nothing for the property conveyed to the defendant, Perry Coal and Lumber Company, and that the title to the property contracted for by plaintiff was worthless. That defendants nor either of them did not own the same and they knew it, to plaintiff's damage in the sum of $45,311,00.

Wherefore this plaintiff prays that citation be issued as required by law, that writs of attachment issue in behalf of this plaintiff against the defendants, and that upon final hearing he have his judgment for his debt as sued for, a foreclosure of attachment liens, and for all general, special and equitable relief and the plaintiff here now offers to do and perform all things in equity and good conscience that this court may require of him.

48

JAMES R. ADAMS.
W. R. ABERNATHY &
G. R. SMITH,
Att'ys for Pl'ff.

Before me on this day personally appeared James A. Adams who being sworn says that the facts alleged in the foregoing petition are true and the said James R. Adams subscribed the same in my presence, witness hand this the 28th day of August 1916.

[L. S.]

A. S. WHEATLEY,
Clerk District Court of Collin County, Texas.

Endorsed: No. 7702. James R. Adams vs. F. C. Cotten, et al., Plaintiff's. Original petition. Attachment. Filed Aug. 28-1916. A. S. Wheatley, Clerk District Court Collin County, Texas ,by C. L. Sears, Deputy.

THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk of the District Court in and for said County and State, do hereby certify that the above and foregoing is a true and correct copy of the Plaintiff's original petition, in cause No. 7702, wherein James R. Adams is Plaintiff and F. C. Cotten et al. are defendants, as the same now appears on file in my office.

Witness my hand the Seal of the District Court of Collin County, Texas, at office in the City of McKinney, Texas, on this 2nd day of June, A. D. 1917.

[SEAL.]

C. L. SEARS,
Clerk District Court Collin County, Texas.

49

EXHIBIT "B."

The State of Texas to the Sheriff or any Constable of Smith County, Greeting:

We command you that you Attach, forthwith, so much of the property of F. C. Cotten, Perry Coal & Lumber Company and Daniel Hewitt, if to be found in your County, repleviable on security, as shall be of value sufficient to make the sum of Forty-Five Thousand three hundred eleven $45,311.00) Dollars and the probable costs of suit, to satisfy the demands of James R. Adams and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereupon, to be

had before our — Court, in the City McKinney in the County of Collin, on the 3rd Monday in September 1916, same being the 18th day of —, when and where you shall make known how you have executed this writ.

Witness, A. S. Wheatley, Clerk of the District Court of Collin County.

Given under my hand and the seal of Court, at office in McKinney this the 5th day of September, A. D. 1916.

[SEAL.] A. S. WHEATLEY,
Clerk District Court Collin County, Texas.
[L. S.] By C. L. SEARS,
Deputy.

Sheriff's Return.

Came to hand on this the 7th day of September 1916, and executed on the 14th day of September 1916, at 11 o'clock A. M., by levying upon and taking into my possession, as the property of the within named defendants F. C. Cotton, et al. all of the following described Real Estate property situated in Smith County,
50 Texas, to-wit:

All that certain lot number eight (8) of Hadens subdivision of Block 521, of the City of Tyler, as shown by map of record, deed records of Smith County, Texas, Vol. 106 page 217, and being the same property deeded to Mrs. Fannie May Adams, by J. G. Towns and wife B. I. Towns by deed dated July 5th 1912, and recorded in vol 109 p 213, Deed Records of Smith County, Texas. The above field notes found in deed from Jas. R. Adams and *and* wife Fannie May Adams to Daniel Hewitt, as Recorded in vol. 123 page 603 Deed Records, Smith County, Texas. Said deed bearing date April 3, 1916.

H. R. TURNER,
Sherif Smith County, Texas.
By BRYAN B. BLAIN,
Also Received my fee 1.50

Fees—Levy and Return	$2.00
Copy " "	1.00
Total	3.00

9-8-1916. Paid by James R. Adams.

THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk District Court in and for said County and State do hereby certify that the above and foregoing to be a true and correct copy of the original attachment writ, and Sheriff's Return, issued out of the District Court of Collin County, Texas, to

Smith County, in cause No. 7702, wherein, James R. Adams is Plaintiff, and F. C. Cotton, et al. are defendants, as the same now appears on file in my office.

Given under my hand and the seal of the District Court, at office in the City of McKinney, this the 4th day of June, A. D. 1917.

[SEAL.] C. L. SEARS,
Clerk District Court Collin County, Texas.

Endorsed: No. 7702. James R. Adams vs. F. C. Cotton, et al. Writ of Attachment. Issued 5th day of September, 1916. A. S. Wheatley Clerk, Dist. Court Collin Co., Texas. By C. L. Sears, Deputy.

51 EXHIBIT "B."

The State of Texas, to the Sheriff or any Constable of Johnson County, Greeting:

We command you, that you attach forthwith so much of the property of F. C. Cotten, Perry Coal and Lumber Company, and Daniel Hewitt if to be found in your County, repleviable on security, as shall be of value sufficient to make the sum of Forty-Five Thousand three Hundred Eleven ($45311.00) and — 100 dollars, and the probable costs of suit, to satisfy the demands of James A. Adams and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before our court in the City McKinney in the County of Collin on the 3rd Monday in September 1916 same being the 18th day when and where you shall make known how you have executed this writ.

Witness A. S. Wheatley, Clerk of the District Court of Collin County.

Given under my hand and seal of Court, at office, in the City McKinney this 29th day of August, A. D. 1916.

[SEAL.] A. S. WHEATLEY,
Clerk District Court, Collin Co., Texas.
By C. L. SEARS, *Deputy.*

Came to hand on this the 29th day of August 1916, and executed on the 29th day of August 1916, at 6.45 o'clock P. M., by levying upon and taking into my possession as the property of the within named defendants F. C. Cotten, Perry Coal & Lumber Co. and Daniel Hewitt all of the following described real property, situated in Johnson County, Texas, to-wit:

W. H. Moore to F. C. Cotton, Trustee. Book 187. Page 481.

52 First tract. A part of the T. J. Lynch survey described as follows: beginning at the southeast corner of the E. G. Lynch

pre-emption survey of 160 acres; thence N 30 W. 740 varas to a stake in the E. line of said Lynch survey; Thence N. 60 E. 582 varas to the N. W. Corner of the A. M. Wilbanks 148½ acre survey, Thence S. 30 E. 740 varas to a stake in the corner of A. G. Wilbanks survey; Thence S. W. 582 vrs. to the beginning, containing 62 acres, more or less, and being the same land conveyed by A. M. Wilbanks and wife to S. M. Hill by deed dated Nov. 16, 1903 recorded in Johnson Co. Deeds Records.

Second tract. (A) About 13½ miles south 57 W from the City of Cleburne, Texas, and being the A. M. Wilbanks survey, pre-emption, and described as follows; beginning at the S. W. corner of the B. Cain survey of 240 acres; thence S. 60 W. 212 vrs. to the southwest corner of the A. G. Wilbanks survey; pre-emption, a mound of rock; thence N. 30 W. 1087 vrs. to the N. E. corner of said A. G. Wilbanks survey; thence S. 60 W. 150 vrs to the boundary line of the T. J. Lynch survey, a mound; thence N. 30 W. 444 vrs. to the N. W. corner of this survey in the S. boundary line of the D. Daniels survey, a mound; thence N. 60 E. 1362 vrs. to a rock mound, the S. Boundary line of the D. Daniels survey; thence S. 30 E. 450 vrs. to a mound of rock in the N. boundary line of B. Cain survey; thence S. 60 W. 1000 vrs to the N. W. corner of the B. Cain survey; thence S. 30 E. 1083 vrs. to the place of beginning.

(B) Also the A. G. Wilbanks pre-emption survey described as follows; beginning N. 30 W. 64 vrs from the N. E. corner of the A. T. Lafon Pre-emption survey; Thence N. 18 W. 180 vrs to a rock mound from which a cedar 12 inches in diameter bears North 8 west 4 vrs; thence N. 6 W. 180 vrs with the line of fence to a double Cedar for corner; Thence N. 120 vrs to a cedar 20 inches in diameter bears S. 10 E. 9½ vrs; thence N. 54
53 W. 34 vrs to a rock pile an Elm Bears S. one vrs; thence N. 47 84 vrs to a double Elm for corner; thence N. 1 W. 104 vrs to a rock pile; thence N. 14 W. 290 vrs to a rock pile in the E. Boundary line of A. G. Wilbanks survey; thence N. 30 W. 320 vrs to his N. E. corner; thence S. 60 W. 150 vrs to a rock pile; thence S. 30 E. 200 vrs; thence S. 60 W. 475, vrs to a rock pile; thence S. 30 E, 732 vrs to the place of beginning. The above last two named tracts A. and B. containing 221 acres of land and being the same land as was conveyed by A. M. Wilbanks and wife to S. M. Hill by deed dated March 6th, 1902, recorded in Vol. 103, page 61, Johnson County, Records of Deeds.

Third tract. (A) On the waters of the Brazos River S. 57 W. from the City of Cleburne, being the B. Cain survey patented to W. C. Sweatt, Assignee of B. Cain, Aug. 20th, 1856, described as follows:—Beginning 300 vrs South 60 W. from the N. W. corner of a survey made for the heirs of N. Dabney; thence N. 30 W. 1076 vsr to a mound of rock from which a Juniper and Live Oak bears North 24 E. thence north 60 E. 1250 vrs. to a rock in prairie; thence S. 30 E. 1076 vrs to the N. E. corner of said Dabney survey; thence S. 60 W. 1250 vrs to the place of beginning containing 240 acres, (*b*) On the waters of the Brazos River S. 57 W. from the

City of Cleburne, being the James N. Rush survey and patented to Jas. P. Douglas, assignee of Jas. N. Rush Feb. 12th 1878, bounded as follows:—Beginning at the N. W. corner of 160 acres survey in the name of W. F. Lafon, an Elm 24 inches in diameter S. 85 W. 66 vrs; thence N. 30 W. 1840 vrs to a rock for corner; thence N. 60 E. 970 vrs to corner, thence S. 30 E. 1840 vrs to the N. E. corner of said Lafon survey a rock mound in prairie; thence S. 60 W. 970 vrs to the place of beginning and containing 316 acres of land, both of said last named tracts A. and B. being
54 the same land as conveyed by Jerry F. Smith and wife to S. M. Hill, by deed dated Feb 28th, 1902 recorded in Vol. 103 page 56, Johnson Co. Records of Deeds.

Fourth tract. 160 acres patented to W. F. Lafon on Jan. 15th, 1889, by patent No. 471, Vol. 21, lying on the Waters of Camp Creek about 12 miles S. 53 W. Cleburne, Texas;— Beginning at the S. E. corner of H. H. Wilbanks pre-emption survey on the survey on the N. boundary line of the J. S. Coy survey; thence N. 30 W. at 170 vrs in branch course S. W. in all 950 vrs to a mound of rock in N. Dabney's E. line an Elm 24 in diameter S. 85 W. 66 vrs; Thence N. 60 E. 950 vrs to a rock mound in prairie, a forked live oak 10 inches in diameter bears N. 11½ W. 78 vrs; Thence S. 30 E. 950 vrs to the north line of said Coy survey 36 vrs S. 60 W. from said Coy's N. E. corner, a mound of stone; thence S. 60 W. 950 vrs to the place of beginning and containing 160 acres, and being the same land conveyed by W. L. Lafon and wife to S. M. Hill by deed dated October 27th, 1902, recorded in Vol. 105 page 478, Deed Recorded Johnson County, Texas. The four tracts containing in all 1000 acres and same conveyed to W. A. Woodruff on January 2nd, 1914.

W. W. Brown et al to F. C. Cotten, Book 1886, page 471.

First tract. Being part of section 24 and 25 H & T. C. R. R. Co. survey; beginning at the southwest corner of tract of land formerly owned by A. J. Price; thence N. 30 W. 961 vrs. to rock for corner; thence N. 60 20 vrs. a rock for corner; thence N. 30 W. 562 vrs to rock for corner; thence S. 60 W. 271½ vrs. to N. E. corner of a tract formerly owned by B. B. Ramsey; thence S. 30 E. 1523 vrs. to S. E. corner of B. B. Ramsey tract; thence N. 60 E. 251
55 vrs. to the place of beginning, containing 6 acres.

Second tract. Being part of section No. 24, H. & T. C. R. R. Co. survey; beginning at the S. W. corner of a tract of land formerly owned by J. R. Ramsey; thence N. 30 W. 1523 vrs. to the N. W. corner of said J. R. Ramsey tract, thence S. 60 W. 397 vrs. to mound of rock in *in* the line of said Sec. 24 thence S. 30 E. 1148 vrs. to Ed Spears S. E. cor, thence S. 60 W. 540 vrs to N. W. cor. of H & T. C. R. R. Co. Sec. 24; thence S. 30 E 323 vrs to N. W. corner of H. B. Gatewoods tract of land; thence N 60 E. 1036 vrs to the place of beginning, containing 137½ acres, more or less.

Third tract. Being 107½ more or less, being part of surveys

Nos. 25 and 27 of H & T. C. R. R. Co.; beginning at the N. W. cor. of N. B. Harmon 157 acre tract; thence S. 30 E. with the W. B. line of said Harmon tract 1043 vrs.; thence S. 60 W. vrs; thence N. 30. W. 1043 vrs; thence N. 60 E. 588 vrs. to the place of beginning, being the same land conveyed to W. E. Lowe by deed recorded in Vol. 81, page 498, Deed Records of Johnson County, Texas, less the following tract; beginning S. 30 E. 1043 vrs. from the N. W. cor. of N. B. Harmons' tract of 157½ acres, a rock in the W. line of same; thence S. 60 W. 588 vrs. to a stake; thence N. 30 W. 144 vrs. to the N. W. corner of the tract conveyed by A. J. Price to R. J. Nichols; thence N. 60 E. with the N. line of said tract to the N. W. corner of same in the W. line of said Harmon tract; thence S. 30 E. to the place of beginning.

F. C. Cotton to Cleburne Traction Co. Book 189, page 316.

An ordinance granting to F. C. Cotten, his successors and assigns, the right to construct, operate and maintain a street railway system over, on, along and across the public streets and alleys and Thoroughfares of the City of Cleburne, Johnson County,
56 Texas, and all additions thereto and also authorizing and granting the power and right to construct maintain and operate all necessary power plants poles, wires, equipment and appliances for maintaining and operating said railway, together with the right to construct maintain and operate in said City an electric light and power plant for the manufacture and sale of electric light and power and the right to place and maintain poles and wires over the streets of said City for said purposes. Said Cleburne Traction Company, its successors and assigns, covenant and agree with said F. C. Cotten to same harmless and indemnify said Cotten with respect to any default on the part of said Cleburne Traction Company in the full observance and performance of all the terms, conditions, stipulations and obligations imposed by said ordinance upon said Cotten. All and singular all equipment, car material of each and every kind and description that now composes the Cleburne, Traction Co., or that may be added to any part or portion of said Cleburne Traction Co. or Street railway System by the said F. C. Cotten as trustee for Cleburne Traction Co. or by his successors or assigns. It being also all Tracks, Rails, Ties, Poles, wire and appliances of any character whatsoever belonging to and used as a part of the Street Railway system of said Cleburne Traction Co.

(For more particular description see Deed, Cleburne Street Rail-Co., to John W. Floore, Johnson County Deed Record Vol. 183, page 280. Also Deed of Trust record Vol. 71, page 480 Deed of Trust Records Johnson County, Texas)

John W. Floore to Daniel Hewitt. Book 190 page 446.

All that certain lot or parcel of land situated in the City of Cleburne, Johnson County, Texas, being lots Six and Seven in Block Two Thirty Nine in City of Cleburne, Texas.

57 C. H. Warren to Daniel Hewitt, Book 188, page 392.

All that certain parcel of land a part of the E. Half of lot R. in block 7, of Heath's addition to the City of Cleburne, Johnson County, Beginning at the N. E. corner of said lot R. thence with the north line of said lot R. 93½ ft. to the N. W. corner of said lot; thence south with W. line of said lot 50 ft. to stake in W. line of said lot to corner; thence E. on parallel line with North of said lot 93½ ft. to the E. line of said lot; thence north with said E. line 50 feet to place of beginning. Less a 9 foot strip off the E. side of said lot, deeded to the City of Cleburne for a street.

Fees—Levy and return..... $2.00
Copy " " 1.00

Total $3.00

Paid Aug. 29, 1916, by J. R. Adams. L. D. Coop-, Sh'ff, Erst. Reed, Dep'ty.

L. D. COOPER,
Sheriff Johnson County, Texas,
By ERNEST REED, *Dep'ty.*

Endorsed: No. 7702. Attachment Writ. In the District Court of Collin County. James R. Adams vs. F. C. Cotten, et al. Issued the 29th day of August 1916, A. S. Wheatley, Clerk Dist. Court Collin Co., Texas. By C. L. Sears, Deputy.

THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk of the District Court in and for said County and State do hereby certify that the above and foregoing to be a true and correct copy of the original attachment writ and Sheriff's return issued out of the District Court of Collin County, Texas, to Johnson County, in cause No. 7702, wherein James R. Adams is Plaintiff, and F. C. Cotton, et al., are Defendant-, as the same now appears on file in my office.

Given under my hand and the Seal of the District Court of Collin County, Texas, at office in the City of McKinney, Texas, on
58 this 4th day of June, A. D. 1917.
[SEAL.]

C. L. SEARS,
Clerk District Couprt Collin Co., Texas.

EXHIBIT "B."

The State of Texas to the Sheriff or any Constable of Wharton County, Greeting:

We Command You that you Attach, forthwith, so much of the property of F. C. Cotton, Perry Coal & Lumber Company and Daniel Hewitt, if to be found in your County, repleviable on security, as shall be of value sufficient to make the sum of Forty Five Thousand three hundred eleven ($45,311.00) Dollars and the probable costs of suit, to satisfy the demands of James R. Adams and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before our Court, in the City of McKinney, in the County of Collin, Instanter, when and where you shall make known how you have executed this writ.

Witness A. S. Wheatley, Clerk of the District Court of Collin County.

Given under my hand and the seal of said Court, at office, in the City of McKinney this the 20th day of September, A. D. 1916.

[SEAL.] A. S. WHEATLEY,
Clerk District Court Collin County, Texas,
By C. L. SEARS, *Deputy.*

Sheriff's Return.

Came to hand on this the 23rd day of September, 1916, and executed on the 6th day of Oct. 1916, at 4 o'clock P. M., by levying upon and taking into my possession, as the property of the
59 within named defendants F. C. Cotten all of the following described personal property, situated in Wharton County, Texas, to wit: 30 acres of Blue Rose Rice in shock on the F. C. Cotton farm about 1 mile N. E. of Nottawa.

One Bail Cotton grown by Mr. Crow all on F. C. Cotton farm, one mile of the town of Nottawa in Wharton County, Texas.

Fees—Levy and Return....	$2.50
Copy " "	1.00
44 miles	2.20
Total	$5.70

C. D. KEMP,
Sheriff Wharton County, Texas.

Endorsed: No. 7702. James R. Adams vs. F. C. Cotton, et al. Writ of Attachment. Issued 20th day of September 1916. A. S. Wheatley, Clerk Dist. Court Collin Co. Texas by C. L. Sears, Deputy. Filed Oct. 11, 1916. A. S. Wheatley, Clerk District Court, Collin County, Texas.

THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk District Court, in and for said County and State, do hereby certify *that* the above and foregoing to be a true and correct copy of the original Attachment Writ and Sheriff's Return issued out of the District Court of Collin County, Texas, to Wharton County, in cause No. 7702, wherein, James R. Adams is Plaintiff, and F. C. Cotton, et al., are Defendants, as the same now appears on file in my office.

Given under my hand and the seal of the District Court, at office in the City of McKinney, this the 4th day of June, A. D. 1917.

[SEAL.] C. L. SEARS,
Clerk District Court Collin County, Texas.

60 EXHIBIT "B."

The State of Texas to the Sheriff or any Constable of Wharton County, Greeting:

We Command You that you Attach, forthwith, so much of the property of F. C. Cotton, Perry Coal & Lumber Company and Daniel Hewitt, if to be found in your County, repleviable on security, as shall be of value sufficient to make the sum of Forty Five Thousand three hundred eleven ($45,311.00) Dollars and the probable costs of suit, to satisfy the demands of James R. Adams, and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before our Court, in the City of McKinney, in the County of Collin, Instanter, when and where you shall make known how you have executed this writ.

Witness, A. S. Wheatley, Clerk of the District Court of Collin County.

Given under my hand and the seal of said Court, at office in City of McKinney, this the 20th day of September, A. D. 1916.

[SEAL.] A. S. WHEATLEY,
Clerk District Court Collin County, Texas,
By C. L. SEARS, *Deputy.*

Came to hand on this the 23rd day of September, 1916, and executed on the 23rd day of September, 1916, at — o'clock — M., by levying upon and taking into my possession, as the property of the within named defendants F. C. Cotton, all of the following described Personal property, situated in Wharton County, Texas, to-wit: Seventy acres of Blue rose Rice, situated in South Central part of A. L. Welch Rice crop which is cut and in shock; Also one half of two

bales of Cotton grown by Mr. Crow, all on F. C. Cotton farm one mile N. E. of Natawa.

Fees—Lev-ing and Return..	$2.50
Copy " " ..	1.00
Mileage 44 mi.....	2.20
Total.....	$5.70

C. D. KEMP,
Sheriff Wharton County, Texas.
By L. B. ROOKER, *Deputy.*

61 THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk District Court, in and for said County and State do hereby certify that the above and foregoing to be a true and correct copy of the original Attachment Wr-t and Sheriff's Return issued out of the District Court of Collin County, Texas to Wharton County, in Cause No. 7702, wherein James R. Adams is Plaintiff and F. C. Cotton, et al., are Defendants, as the same now appears on file in my office.

Given under my hand and the seal of the District Court, at office in the City of McKinney, this the 4th day of June, A. D. 1917.

[SEAL.] C. L. SEARS,
Clerk District Court Collin County, Texas.

Indorsements: No. 7702. James R. Adams, vs. F. C. Cotton, et al. Writ of Attachment. Issued 20th day of September, 1916. A. S. Wheatley, Clerk, Dist. Court Collin Co., Texas, by C. L. Sears, Deputy. Filed Oct. 11, 1916. A. S. Wheatley, Clerk District Court, Collin County, Texas, By C. L. Sears, Deputy.

62

EXHIBIT "B."

The State of Texas to the Sheriff or any Constable of Tarrant County, Greeting:

We command you that you Attach, forthwith, so much of the property of Perry Coal & Lumber Company, F. C. Cotton and Daniel Hewitt, if to be found in your County, repleviable on security, as shall be of value sufficient to make the sum of Forty-Five Thousand Three Hundred Eleven, ($45,311.00) Dollars and the probable costs of suit, to satisfy the demands of James R. Adams and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before our Court, in the City of McKinney, in the County of Collin, on the 3rd Monday in September 1916, same being the 18th

day, when and where you shall make known how you have executed this writ.

Witness, A. S. Wheatley Clerk of the District Court of Collin County.

Given under my hand and the seal of said Court, at office in the City of McKinney this the 28th day of September, A. D. 1916.

A. S. WHEATLEY,
Clerk District Court Collin Co., Texas,
By C. L. SEARS,
Deputy.

Came to hand on this the 28th day of Aug. 1916, and executed on the 28th day of Aug. 1916, at 4:30 o'clock P. M., by levying upon and taking into my possession, as the property of the within named defendants Perry Coal & Lumber Company, F. C. Cotton & Daniel Hewitt all of the following described Real property, situated in Tarrant County, Texas, to-wit: Lot No. 12, Block 5, of the first filing to the Rosen Heights addition to the City of North Fort Worth,
Tarrant County, Texas, Book 495, page 204, Deed Dated
63 2-22-16, Filed 2-28-16, together with all water mains & conducts, machinery, Engines, Meters connected or used therewith and Franchise.

N. C. MANN,
Sheriff Tarrant County, Texas,
By G. S. WILLIAMS,
Deputy.

Fees—Levy and return.....$2.50
Copy " " 1.00

Total $3.50

THE STATE OF TEXAS,
County of Tarrant:

I hereby certify that the above and foregoing is a true and correct copy of the Writ of Attachment and return thereon in above styled case so far as the same relates to lands in Tarrant County.

Given under my hand, this the 29th day of August 1916.

[SEAL.]

W. H. LOGAN,
County Clerk.

THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk of the District Court, in and for said County and State, do hereby certify *that* the above and foregoing to be a true and correct copy of the original Attachment Writ and Sheriff's

Return in cause No. 7702, wherein James R. Adams is plaintiff, and F. C. Cotton, et al. are defendants, as the same now appears on file in my office.

Given under my hand and the seal of said Court, at office in the City of McKinney, this the 2nd day of June, A. D. 1917.

[SEAL.] C. L. SEARS,
Clerk District Court Collin County, Texas.

(Endorsed:) No. 7702. James R. Adams vs. F. C. Cotten, et al. Writ of Attachment. Issued 28th day of August 1916. A. S. Wheatley Clerk District Court Collin Co., Texas. By C. L. Sears, Deputy. Received and filed for record at 5.50 o'clock P. M. Aug. 28, 1916. W. H. Logan County Clerk Tarrant County, Texas.

64

EXHIBIT "B"

The State of Texas to the Sheriff or any Constable of Wharton County, Greeting:

We command you, that you attach forthwith so much of the property of F. C. Cotton, Perry Coal & Lumber Company and Daniel Hewitt, if to be found in your County, repleviable on security, as shall be of value sufficient to make the sum of Forty-Five Thousand three Hundred Eleven ($45,311.00) and /100 Dollars, and the probable costs of suit, to satisfy the demand of James R. Adams and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before our court in the City McKinney in the County of Collin on the 3rd Monday in September 1916 same being the 18th day when and where you shall make known how you have executed this writ.

Witness A. S. Wheatley, Clerk of the District Court of Collin County.

Given under my hand and seal of Court, at office, in the City — McKinney this 29th day of August, A. D. 1916.

A. S. WHEATLEY,
Clerk District Court Collin Co., Texas.

[SEAL.] By C. L. SEARS,
Deputy.

Came to hand on this the 30 day of Aug. 1916, and executed on the 30 day of Aug. 1916, at 11:15 A. M., by levying upon and taking into my possession as the property of the within named defendants, F. C. Cotton, Perry Coal and Lumber Co. and Daniel Hewitt all of the following described real property, situated in Wharton County, Texas, to-wit:

Deed Records, Vo. 43, Page 515.

#1.

Tract or parcel of land in Wharton County, State of Texas,
65 described as follows: 500 acres out of the Richard Boatright league; Beginning at an iron pipe set in the west side of 30 foot graded road same being north 73 east 2348.81 varas and south 16-47 east 1969.9 vrs. from the N. W. corner of said Boatright league, the same being the N. W. corner of this tract; thence north 73 east 1976.8 varas to the center of Middle Bernard Creek, from which an iron pipe set on the west bank of the said creek bears south 73 west 8 varas; thence down said creek with its meanderings to the S. E. corner of this tract; thence south 73 west 2067.8 varas with the south line of this tract, same being south line of lot # 2 of the Westmoreland subdivision said league; thence north 72-59 West 108 varas with the north line of the Nottawa and East Bernard Public road to stake for corner; thence north 16-47 west at 1039.3 vrs. passing the N. W. corner of said lot #2 same being the S. W. corner of lot #3 of said subdivision and continuing said course 1374.1 varas in all to an iron pipe and place of beginning and being the same land described in deed from E. W. Way Ella A. Way and C. C. Way, to Chesley Smith, dated 13th day of November, A. D. 1913, here referred to for description of said land.

#2.

Situated in Wharton County, Texas, and out of the Richard Boatright league; Beginning at a point in the Middle of Bernard Creek as ascertained by a survey made in accordance with an agreement between Elmer E. Foley and E. W. and C. C. Way; thence following the meanderings of said Bernard creek north to a corner in said Creek, from which a pin oak marked J. bears south 95.5 east 29 feet or 10.5 varas; thence south 73 west with the south line Meilsch Bris. 219 varas to their S. W. corner; thence northward with the west line of said Meilsch Bros. tract 501 varas to their N. W. corner in the south line of the J. C. Senkel tract; thence south 73
66 west with J. C. Senkel's line 301 varas to his S. W. corner; thence northward with his west line 804 varas more or less to his N. W. corner to a large cypress post in the north line of said Boatright league; thence South 73 west at 140 varas a creek at 500 varas a creek at 1365 varas to the N. E. corner of a 100 acre tract of land convey to Ayers & Graybill by Stockton & Leveridge; thence south 163¼ along the east line of said 100 acre tract to the N. W. corner of a 500 acre tract described in deed from E. W. & Ella W. Way and C. C. Way to Chesley Smith thence running easterly along the north boundary line of said 500 acre tract of land to the point of beginning, containing in all 569.8 acres of land more or less, making a total in the two tracts of 1069.8 acres of land more or less, together with all water mains, pumps, conduits, machinery, engines, meters and tanks connected or used therewith.

THE STATE OF TEXAS,
County of Wharton:

I, P. G. Brooks, Clerk of the County Court of Wharton County, Texas, certify that the foregoing instrument of writing dated on the 29 day of August, 1916, with the certificate of authentication was filed for record in my office on the 30 day of Aug. A. D. 1916, at 11.35 o'clock A. M., and duly recorded the 30 day of Aug. A. D. 1916, at 1 o'clock P. M., in the Attachment Records of Wharton County, Vol. 1, page 85.

Witness my hand and Seal of office, at office, in Wharton, Texas, the day and year last above written.

[SEAL.] P. G. BROOKS,
Clerk County Court Wharton County, Texas.

THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk of the District Court in and for said County and State, do hereby certify that the above and foregoing is a
67 true and correct copy of the Original Attachment Writ, and Sheriff's Return on same, said Attachment Writ was issued out o fthe District Court of Collin County, Texas, to Wharton Co. Tex. in cause No. 7702, wherein James R. Adams is Plaintiff and F. C. Cotton et al. are Defendants, as the same now appears on file in my office.

Witness my hand and the Seal of the District Court of Collin County, Texas, at office in the city of McKinney, on this 4th day of June, A. D. 1917.

[SEAL.] C. L. SEARS,
Clerk District Court Collin County, Texas.

Fees—Levy & return	$2.00
Copy	1.00
Total	3.00

P'd by Pl'ff.

C. D. KEMP,
Sheriff Wharton Co., Tex.

Indorsements: No. 7702. Attachment writ in Dist. Court, Collin Co. James R. Adams vs. F. C. Cotten et al. Issued 29th day Aug. 1916. A. S. Wheatley, Cl'k. Dist. Court, Collin Co., Tex., by C. L. Sears. Dep. Filed Feb'y record Aug. 30, 1916, at 11:35 o'clock P. M. P. G. Brooks, C. C., Wharton Co., Tex.

68 EXHIBIT "B."

The State of Texas to the Sheriff or any Constable of Wharton County, Greeting:

We command you that you Attach, forthwith, so much of the property of F. C. Cotton, Perry Coal and Lumber Company, and Daniel Hewitt, if to be found in your County, repleviable on security, as shall be of value sufficient to make the sum of Forty Five Thousand three Hundred Eleven ($45,311.00) Dollars and the probable costs of suit, to satisfy the demands of James R. Adams and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before our — Court, in City McKinney, in the County of Collin, on the 3rd Monday in September, 1916, same being the 18th day, when and where you shall make known how you have executed this writ.

Witness, A. S. Wheatley, Clerk of the District Court of Collin County.

Given under my hand and the seal of Court, at office in City McKinney this 29th day of August, A. D. 1916.

[SEAL.]

A. S. WHEATLEY,
Clerk District Court Collin County, Texas,
By C. L. SEARS,
Deputy.

Came to hand this the 30th day of August, 1916, and executed on the 30 day of August, 1916, at 11.15 o'clock A. M., by levying upon and taking into my possession, as the property of the within named defendants F. C. Cotton, Perry Coal and Lumber Co. and Daniel Hewitt all of the following described Real property, situated in Wharton County, Texas, towit:

Deed Records, Vol. 43, Page 515.

#1.

69 Tract or parcel of land in Wharton County, State of Texas, described as follows: 500 acres out of the Richard Boatright league; Beginning at an iron pipe set in the west side of 30 foot graded road same being north 73 east 2348.81 varas and south 16-47 east 1969.9 vrs. from the N. W. corner of said Boatright league, the same being the N. W. corner of this tract; thence north 73 east 1976.8 varas to the center of Middle Bernard Creek, from which an iron pipe set on the west bank of the said creek bears south 73 west 8 varas; thence down said creek with its meanderings to the S. E. corner of this tract; thence south 73 west 2067.8 varas with the south line of this tract, same being the south line of lot #2 of the Westmoreland subdivision said league; thence north 72-59 west 108 varas

with the north line of the Nottawa and East Bernard Public road to stake for corner; thence north 16-47 west at 1039.3 vrs. passing the N. W. corner of said lot #2 same being the S. W. corner of lot #3 of said subdivision and continuing said course 1374.1 varas in all to an iron pipe and place of beginning and being the same land described in deed from E. W. Way, Ella A. Way and C. C. Way, to Chesley Smith, dated 13th day of November, A. D. 1913, here referred to for description of said land.

#2.

Situated in Wharton County, Texas, and out of the Richard Boatright league, Beginning at a point in the Middle of Bernard Creek as ascertained by a survey made in accordance with an agreement between Elmer E. Foley and E. W. and C. C. Way; thence following the meanderings of said Bernard Creek north to a corner in said creek, from which a pin oak marked J. Bears south 95.5 east 29 feet or 10.5 varas; thence south 73 west with the south line Meilsch Bros. 219 varas to their S. W. corner; thence northward with the west line of said Meilsch Bros., tract 501 varas to their N. W. corner
70 in the south line of the J. C. Senkel tract; thence south 73 west with J. C. Senkel's line 301 varas to his S. W. corner; thence northward with his west line 864 varas more or less to his N. W. corner to a large cypress post in the north line of said Boatright league; thence south 73 west at 140 varas a creek at 500 varas a creek at 1365 varas to the N. E. corner of a 1000 acre tract of land conveyed to Ayers & Graybill by Stockton & Leveridge; thence south 16¾ along the east line of said 100 acre tract to the N. W. corner of a 500 acre tract described in deed from E. W. & Ella W. Way and C. C. Way to Chesley Smith; thence running easterly along the north boundary line of said 500 acre tract of land to the point of beginning, containing in all 569.8 acres of land more or less, making a total in the two tracts of 1069.8 acres of land more or less, together with all water mains, pumps, conduits, machinery, engines, meters and tanks, connected or used therewith and afterwards on the 12th day of January, 1917, I levied on and took into my possession as the property of F. C. Cotton, the following described personal property, to-wit:

2 discs, 2 gang plows, 2 harrows, 1 wagon, 1 rice seed drill.
1 rice binder.
1 bay horse about 8 years old.
1 brown horse mule about 8 years old.
1 sorrel mare mule about 10 years old.
1 dun horse mule about 10 years old.
1 black mare mule about 6 years old.
1 black horse mule about 6 years old.
16 acres of cotton.
About 200 bushels of corn now gathered and in crib.
About 35 acres of rice now cut and in shock.

71 And afterwards on the 9th day of February, A. D. 1917, in pursuance of an order issued out of the District Court of Collin County, Texas, I returned all of the said above mentioned property to the tenant Welsh, same including:

2 discs, 2 gang plows, two harrows, 1 rice seed drill, 1 wagon, 1 rice binder and 6 head of mules.

The 200 bushels of corn above mentioned were consumed by the mules and tenants in harvesting the rice crop under attachment.

The defendant's interest in the 16 acres of cotton was gathered and sold and the proceeds thereof amounted to the sum of $177.38, as per voucher attached hereto from J. G. Leveridge & Company, of East Bernard, Texas.

The 35 acres of rice were harvested and shipped to El Campo, Texas, and stored and later sold and returns heretofore made under orders of the District Court of Collin County, Texas.

I have received no orders in reference to the real estate levied upon as above mentioned, and same is still held under the within Writ of Attachment.

The Distance actually traveled in executing such process is 50 miles.

C. D. KEMP,
Sheriff Wharton County, Texas.

Sheriff's Fees.

To taking possession of mules and delivering same.....	$6.00
To feed for six head of mules 29 days @ $1.00 per day each	174.00
Total	$180.00
By cas*k*, received from 16 acres of cotton, J. G. Leveridge & Co.	177.38
Balance due Sheriff.....	$2.62

EAST BERNARD, TEXAS, 2/21, 1917.

72 M. Crow, J. A. for C. D. Kemp, in Account with J. G. Leveridge & Co., General Merchandise, Lumber, Post, Furniture, and Undertakers' Supplies. We pay cash for Goods as soon as received and marked up. Cattle Dealers. Hay in car lots.

Sept.	2.	By B/C & Seed.....	....	90.42
"	2.	To weighing	20	....
"	23.	By B/C & Seed.....	....	91.24
"	23.	To weighing & Hauling.....	2.20	....
Oct.	3.	By B/C & Seed.....	....	79.32
"	3.	To weighing & Hauling.....	2.20	....
"	27.	Cash to C. D. Kemp order.....	60.10	....
Feb'y	24.	To cash F. C. Boyden A/C.....	18.80	....
"	24.	Draft Enc. 177.38		....
			260.88	260.98

F. C. Cotten, Dr., to F. C. Boyden.

Planter 3½ days February, 60c	2.10
Cultivator 3½ " " ", 30c	1.05
Middle Buster 3½ " February, 50c	1.75
& Planter 2½, 2.10c	5.25
Pla-ter, 2½, 60c	1.50
Cotton Seed 175#, $— cut	5.25
Use of Wagon & Cotton Sacks for Picking one bale	2.00
	$18.90

C. CROW.

Fees Levy and return	$2.00
Copy " "	1.00
Total	$3.00

Paid by Plff.

C. D. KEMP,
Sheriff Wharton County, Texas.

THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk District Court in and for said County and state do hereby certify *that* the above and foregoing to be a true and correct copy of the original Attachment Writ and Sheriff's Return issued out of the District Court of Collin County, Texas, to Wharton County, in cause No. 7702, wherein, James R. Adams is Plaintiff, and F. C. Cotton, et al. are Defendants, as the same now apears on file in my office.

Given under my hand and the seal of the District Court, at office in the City of McKinney, this the 4th day of June, A. D. 1917.

[SEAL.]

C. L. SEARS,
Clerk District Court Collin County, Texas.

73 (Endorsed:) No. 7702. James R. Adams vs. F. C. Cotten, et al. Writ of Attachment In the District Court of Collin County. Issued the 29th day of August, 1916. A. S. Wheatley, clerk Dis. Court, Collin Co., Texas. By C. L. Sears, deputy.

74 EXHIBIT "C."

STATE OF TEXAS,
County of Collin:

Whereas there is a suit pending in the District Court of Collin County, Texas, wherein James R. Adams is Plaintiff and F. C. Cotten and the Perry Coal and Lumber Company, a corporation, and Daniel

Hewitt are defendants, said suit No. 7702; and whereas, the plaintiff has sued out writs of attachment and had the same levied upon various and sundry pieces of property in different counties in the State of Texas; and whereas, the plaintiff has garnishe-d certain individuals and corporations in the State of Texas, said writs of attachment and garnishment made to secure any judgment which may be recovered in said suit.

And whereas, said James R. Adams and F. C. Cotten are desirous of settling all issues between the plaintiff and defendants in said cause, and to have said suit dismissed; and whereas, certain creditors of said F. C. Cotten are discussing the advisability of filing a petition in bankruptcy against him, and whereas, said James R. Adams is unwilling to release said liens of attachment and garnishment in said cause until such time has elapsed so that bankrupt proceedings would not set aside or defeat the contemplated agreement.

Now therefore, in view of the premises, it is mutually agreed between the said James R. Adams and F. C. Cotten, that F. C. Cotten shall waive any and all rights he has to any of the crops grown on or the revenue to be derived from the 1,070 acres of land situated in Wharton County, Texas, upon which writs of attachment have been levied and which is referred to in the original petition of plaintiff in the case of James R. Adams vs. F. C. Cotten et al., and that he will transfer to said James R. Adams all of said crops or the proceeds thereof and all the revenue derived from said farm for the
75 year 1916, also that he will re-convey and assign to said James R. Adams and vest in him the title and possession to all personal property which he or the Perry Coal & Lumber Co. acquired from the said James R. Adams, except the seed rice planted in 1916.

That he will release or cause to be released a certain lien held by Daniel Hewitt on said lands or personal property and that he will make to said James R. Adams a special warranty deed duly executed by himself and wife to said 1,070 acres of land, subject to the liens thereon when James R. Adams conveyed the same to F. C. Cotten, Trustee.

That he will release or cause to be released all incumbrances placed upon said lands, stock, tools, implements and crops since the said James R. Adams executed a deed to said 1,070 acres of land to F. C. Cotten as Trustee, except as hereinafter provided.

That he will deliver to said James R. Adams a deed which he has in his possession of date November 21st, 1916, from the Perry Coal and Lumber Company to the said F. C. Cotten and deliver possession to all of said personal property, rents, tenements and appurtenances thereto belonging unto the said James R. Adams at once, provided however, that the Frank Stevens Company has a judgment against F. C. Cotten foreclosing a mortgage lien on certain crops grown on said lands for the year 1916, and has a judgment against said tenants on said lands as garnishees, and this debt and judgment said James R. Adams is to pay off and discharge out of the proceeds of the crops grown on said land for the year 1916.

That one T. B. Butler or the Guaranty State Bank of Tyler, holds a mortgage against certain of the personal property hereinabove

mentioned to the amount of $2,000.00 and accrued interest, and the said James R. Adams is to pay off and discharge said mort-
76 gage out of the crops grown on the premises for the year 1916.

There is also a laborer's lien held by one A. L. Welch for approximately $332.00, and James R. Adams also binds himself to settle and discharge said laborer's lien out of the proceeds of said crop and with the exception of the said Stevens Judgment and Butler or Guaranty State Bank of Tyler claim and the Welch laborer's lien hereinabove referred to, said F. C. Cotten binds himself to procure releases duly executed, from all other incumbrances of every nature and description that have been placed against said lands, crops, teams, or tools since said James R. Adams deeded said land to the said F. C. Cotten, Trustee.

It is further stipulated and agreed that said James R. Adams shall have all the rents, crops and revenues arising from and produced upon said lands for the year 1916.

Said F. C. Cotten further binds himself to deliver a written order to James R. Adams, to T. A. Smith, a renter on said farm, and to A. W. Caylor and also to the holder of the proceeds of the Crow cotton crop to be paid into the registry of the District Court of Collin County, Texas, any sum or sums of money in their hands, after the discharge of the liens which James R. Adams in this instrument binds himself to have discharged and paid off, and the said F. C. Cotten agrees that the debts James R. Adams agrees to discharge shall be discharged out of the proceeds of said crops and the said F. C. Cotten represents that he owns said crops subject to the liens herein mentioned.

And the said F. C. Cotten here now relinquishes any and all rights to any and all rents or revenues derived from said place or to be derived from said place during the year 1916, to and in favor of said James R. Adams.

77 The said F. C. Cotten also waives any right he may have by reason of having rented said premises or any part thereof for the year 1917, and hereby assigns to said James R. Adams any right he may have under and by virtue of any contract made with tenants for the year 1917.

It is understood and agreed that said James R. Adams is to go into full possession of said lands, tenements and appurtenances and said personal property grown on said lands for the year 1916 or the proceeds thereof now on hand and being held by any person whomsoever.

It is further stipulated and agreed that the said James R. Adams does not waive his attachment liens or his garnishment liens in this cause, except said James R. Adams agrees that he will at once release the $110.00 garnished in the hands of J. H. Clegg of Ft. Worth, Texas.

It is further stipulated and agreed that four months after the deed from F. C. Cotten and wife to James R. Adams is filed for record and four months after the execution of the terms of this contract if no petition in bankruptcy has been filed against said F. C. Cotten, either

voluntarily or involuntarily, that said James R. Adams will dismiss the above mentioned suit and pay all unpaid costs, and the said James R. Adams agrees to file the deed from F. C. Cotten and wife to him, for record in Wharton County immediately upon receipt of same; and if such proceedings be filed and said F. C. Cotten be not adjudicated a bankrupt upon hearing, then this agreement shall be binding and said cause dismissed.

It is further stipulated and agreed that in the event bankruptcy proceedings, either voluntary or involuntary, be had seeking to declare F. C. Cotten a bankrupt, then and in that event said
78 James R. Adams shall prosecute his suit to a judgment, retaining all attachment and garnishment liens heretofore acquired and that in the event he gets a judgment, said attachment liens may be foreclosed on all of said premises and any net sum or sums received under this agreement, for his own use or that may be paid into the registry of the District Court of Collin County, shall be credited upon any judgment which he may receive.

It is further stipulated and agreed that upon the dismissal of the suit in the District Court of Collin County, under this agreement, that the said James R. Adams and wife will re-convey to the Perry Coal and Lumber Company the 5,000 acres of land conveyed to him by said Company, the said land to be re-conveyed by special warranty deed.

It is further stipulated that the said James R. Adams will return to F. C. Cotten his certain promissory note for Five Hundred Seventy-Seven & 12/100 Dollars, together with a collateral Five Hundred Dollars Bond.

It is further stipulated that if the sums in the hands of the tenants is not sufficient to discharge the obligations undertaken herein by James R. Adams, then a sufficient sum may be withdrawn from the registry of the Court to discharge the balance due, and said James R. Adams agrees to apply all such sums received by him to the discharge of said claims.

This contract is executed in duplicate, one copy of which is delivered to F. C. Cotten and the other to James R. Adams.

Witness our hands this 22nd day of December, A. D. 1916.

(Signed) JAMES R. ADAMS.
F. C. COTTEN.

79 EXHIBIT "D."

In the District Court of Collin County, Texas, September Term, 1916.

JAMES R. ADAMS

vs.

F. C. COTTON et al.

To the Hon. M. H. Garnett, Judge of said Court:

Now at this time comes the defendant- in the above entitled cause and files this their exception to the jurisdiction of this court over the subject matter of this suit and over the defendants, each and all of them, for the following reasons and upon the following grounds:

First.

(1) The said petition shows that the defendant the Perry Coal & Lumber Company is a foreign corporation, incorporated under the laws of the State of Kentucky, and fails to state the objects and purposes of said corporation, and from the name of the corporation, from which the court can only judge of its business, it was incorporated for the purpose of mining and selling coal, and the manufacture and sale of lumber, and there is nothing in said petition that shows that said corporation was authorized to sell lands or trade lands, or to deal in lands and there are no allegations in plaintiff's petition showing that F. C. Cotton was an authorized agent of the defendant corporation to conduct and carry on the business with its name indicates that it was incorporated to conduct and carry on.

(2) The petition fails to state what business the said Perry Coal and Lumber Company has been doing in Texas; it does not show any act of business or any character of business except the sale of lands and the sale and exchange of the land in question, and it does not show that the said Company was authorized to deal in the
80 exchange and sale of land in Texas or otherwise, and there are no allegations in the plaintiff's petition which would show that the plaintiff had the right to sue the said corporation in Texas, it being a corporation of a foreign State.

(3) The plaintiff's petition only alleges that F. C. Cotton and Daniel Hewitt were the agents of said corporation defendant in Texas, without stating what kind or character of agents, and it fails to show that they were such agents in Texas authorized to conduct the business of said Corporation or the business for which said corporation was incorporated to carry on in Texas, and there are no allegations showing that said corporation had such agent or agents in Texas or had authorized to conduct and carry on any business in Texas such as would authorize an institution of this suit, and service of process or citation on them in suit against said corporation.

(4) The said petition only alleges one statement as fraud on the part of said company, which false statement it alleges was made in Collin County, and that was the false statement which it alleges was made by F. C. Cotton, to the effect that the Perry Coal & Lumber Company had a good and perfect title to said lands mentioned in said petition and the petition further alleges that this statement or representation was made prior to the entering into of the contract between the said Cotton for the said corporation and the plaintiff on the 29th day of February, 1916, which contract is copied in the petition, and that such statement as is alleged to be fraudulent could not be taken as a fraudulent statement or representation, for the reason that the said contract provides that abstract of title shall be furnished by the defendant corporation to the said Adams, showing a merchantable title, and the allegations show that an abstract was furnished to the plaintiff by the said Company through said
81 F. C. Cotton, and there are no allegations in plaintiff's petition showing that the representations and statements made after the 29th day of February 1916, were made or that they were had and done in Collin County, Texas, and the only allegations of fraud upon which this suit can or could be predicated, if any, were the allegations of fraud made after the execution of said contract of the 29th day of February 1916, and none of said allegations are alleged to have been made in Collin County, Texas, and there are no such allegations showing that the District Court of Collin County, Texas, had or has any jurisdiction whatsoever over this case and the defendants, or either of them and that if any court has any jurisdiction over this cause, it would be the District Court of Tarrant County, Texas, or the District Court of Johnson County, Texas, or the District Court of some other County than Collin, and the allegations in plaintiff's petition fail to show that the District Court of Collin County, Texas, has any jurisdiction over the subject matter of this suit, or over the person of the defendants.

(5) That the facts as pleaded by the plaintiff fail to show that this court has jurisdiction over the subject matter of this suit or the parties sued herein.

Wherefore, defendants pray that this cause be dismissed or that this court transfer this case either to the District Court of Johnson County, Texas, or to the District Court of Tarrant County, Texas, or to the District Court where said allegations of fraud which are alleged to have been made of the 29th day of February 1916 occurred, and the defendant prays as stated above.

S. C. PADELFORD,
JOHNSON & HARRELL,
Cleburne, Texas,
Attorneys for the Defendants.

82 Second.

(1) And for a plea to the jurisdiction and abatement of this case, these defendants would show that the plaintiff had fraudulently

and falsely alleged on pages 3 and 4 of the petition on file herein, that F. C. Cotton and Daniel Hewitt, acting as agents of the Perry Coal & Lumber Company, represented to the plaintiff that the Perry Coal & Lumber Company had a good and perfect title to said lands, and that such representation was made by Cotton to the plaintiff in Collin County, Texas, prior to Feb. 29, 1916; the defendants allege that this allegation is false and fraudulent and is so falsely and fraudulently alleged for the purpose of attempting to give this Court jurisdiction over this case and over the persons of the defendants; for the defendants allege the fact to be that the defendant Daniel Hewitt was not and has never been the agent or representative of the Perry Coal & Lumber Company and is not now the representative and agent of the Perry Coal & Lumber Company; that he was in Tyler, Texas and has made a trade between T. B. Butler and F. C. Cotton, as a broker or agent of both parties with reference to a street car plant in Tyler, Texas, owned by Butler and certain lands in Kentucky, which F. C. Cotton owned, and that he, as the broker of both Butler and Cotton brought about this exchange of the street car plant owned by Butler for 4,000 acres of land in Kentucky, owned by Cotton, that the plaintiff, James R. Adams, having learned that the defendant, Hewitt, as broker, had made this exchange between Butler and Cotton, called upon Hewitt in Tyler and requested him to bring about a trade between the plaintiff, Adams and Cotton, with reference to a rice farm and certain personal property which plaintiff claimed to own in Wharton County, Texas for some of the land of Cotton or which Cotton represented the owner in Kentucky, and that the said Hewitt
83 was employed by both the plaintiff and said Cotton as broker to bring about said trade between said parties, and that that is the only relationship or agency which said Hewitt had in all the transactions mentioned in the plaintiff's petition, and that the said Hewitt, not knowing anything at all about the lands, either in Wharton County, or in Kentucky and knew nothing at all about the title to any of said lands, and that he made no representations whatever either to the plaintiff or said defendant, Cotton, with reference to the title of the lands in Kentucky, or the value of the lands in Kentucky, and that it was understood that each party was to investigate the title and values of the lands which they proposed to take in exchange for their own land; that all of this occurred in Smith County, Texas, that is, the transaction between the plaintiff and Daniel Hewitt; that the plaintiff listed his said Wharton County property with said Hewitt as his agent to sell and trade with said Cotton; that the said Cotton at said time was in Ft. Worth, Tarrant County, Texas—at the time that Hewitt began to act as agent for the plaintiff in order to bring about a deal between plaintiff and defendant, Cotton, with reference to an exchange of said properties, and was found that Cotton was in Ft. Worth, and that then a date was made with Cotton for plaintiff to call at Ft. Worth and see him with reference to an exchange of these properties and the said date having been made by the plaintiff with said Cotton himself, not in the presence of Hewitt; that about the 8th day of

February 1916, the said plaintiff, according to said appointment, called upon Cotton in Ft. Worth Tarrant County, Texas and they entered into a contract for the exchange of 4,000 acres of the Kentucky land for the rice farm of 1,064 acres in Wharton County; that none of the defendant up to this time had been in Collin County and no representations were made either in Collin County, or any other county with reference to the title to said lands;
84 that discovering that the plaintiff had certain personal property on the lands or ranch in Wharton County, the contract was rewritten on the 29th day of February 1916, and entered into in Ft. Worth and is the contract, a copy of which is made a part of and incorporated in plaintiff's petition, on the 4th page thereof, and reference is made to the contents of said contract on the 4th page thereof; and that up to the time of the making of said contract on the 29th day of February 1916, none of the defendant- were ever in Collin County, Texas, never had any personal communication with the plaintiff in Collin County, Texas, and never wrote him and representations as to the title of said lands in Collin County, Texas, and that no representations, either in writing or otherwise were made to plaintiff by and of the defendants in Collin County, Texas, and that none of the defendants were in Collin County, Texas, before the deeds were executed in carrying out said contract of the 29th day of February 1916; that all of the negotiations and representations were made either in Tarrant County or Smith County, or in Wharton County, or on the train between Dallas and Wharton County, at the time Adams took the defendant, Cotton and went with him to Wharton County to inspect the farm which was after the 29th day of February 1916, and before the delivery of the deeds, and that all of the trade was completely made and entered into and reduced to writing and all representations were made prior to any of the defendant- being in Collin County, Texas, and that after the trade had been made and agreed to that only Cotton and the plaintiff merely went to Plano to execute the deeds, the wife of the plaintiff being in Plano, that at this time the title to the Wharton County land was not in Adams and Cotton had to go to Plano in order for the plaintiff to obtain a deed to said Wharton Co. land, and that he executed the deed to the defendant,
85 Cotton for the Wharton County ranch, and that prior to their merely going to Collin County to have the deed executed everything was agreed to and no agreement was made whatsoever with reference to said land in Collin County, and all that was done with to said trade in Collin County was merely the execution of the deeds and the allegation in plaintiff's petition to the effect that the defendants, Hewitt and Cotton made said representations as to the title to the Kentucky land in Collin County prior to the contract of the 29th day of February 1916, are absolutely false and fraudulently made, for the purpose of giving this court jurisdiction over the parties to this suit and over this suit.

(2) The defendants deny all and singular the false statements and representations which the plaintiff claims were made with ref-

erence to the abstract and the opinion of said Cope mentioned in plaintiff's petition; that all of said allegations are set forth in said petition for the fraudulent purpose of attempting to give this court jurisdiction as defendants are informed and believes and alleges the facts to be; that the defendants allege the facts to be that the plaintiff traded and exchanged his lands in Wharton County and the Kentucky lands upon the statements of said Butler in Tyler, Texas; that the said Butler had had the title to the Kentucky lands which he traded for investigated by attorneys and accepted the title to the lands in Kentucky that he traded for, and that the plaintiff consulted said Butler with reference to said fact, and the defendants are informed and believes that the plaintiff told said Butler that his lands in Wharton County were not worth any more or very little more than the mortgage that was upon it, and that he was not risking anything by trading it, and that he would not lose anything by trading, and that Butler then told the plaintiff that he could afford to take shot at the lands in Kentucky if he was not trading
86 anything for it; that all that said Cotton ever did was to send by mail an abstract of title with the certificate of said Cope to it stating in substance that he thought the abstract showed good title, and that it was for him to approve or reject the title and that as shown by the contract of exchange, he had a specified time to examine or have examined said abstract, and look into the title, and that without any representations whatsoever made by the defendants, the plaintiff accepted said title, and on or about March 16, the plaintiff executed the deed to the defendant, Cotton, to the Wharton County land, and the defendant, Cotton, for and as trustee for the defendant, Perry Coal & Lumber Company, delivered to the plaintiff a deed to the plaintiff for the Kentucky lands, and that after the trade had been closed and the deeds passed, and on or about the 10th day of April, 1916, the said Cotton merely gave it as his opinion that the title to the lands in Kentucky which had prior thereto been deeded to the plaintiff was good and this is all that any of the defendants ever said to the plaintiff with reference to the title to the land in Kentucky, and this was after the deeds had been passed and the trade closed; and the defendants deny that they ever represented to the plaintiff that the said title was good and perfect as neither of the defendants knew and were incapable of judging of a good and legal title, for either tract of land, and supposed that the plaintiff would have the title to the land investigated before he accepted the title and not having rejected it, they knew nothing at all about why the plaintiff accepted the title, excepts as they believed, he accepted it upon the conversation stated above, with said Butler, and they aver that all of said allegations of fraud are and were false and were made and set forth in plaintiff's petition for the wrongful and fraudulent purpose of attempt-
87 ing to give this Court jurisdiction.

(3) And these defendants further aver that neither of said defendants were not at the institution of this suit nor at the time of the service of citation herein, nor at the time of the filing of such

petition, a resident of the County of Collin, Texas, that all of the defendant-, except Daniel Hewitt and F. C. Cotton were non-residents of the State of Texas and did not reside in Texas, and that Daniel Hewitt, was during all of said time mentioned above, a resident citizen of Johnson County, Texas, and that F. C. Cotton was a permanent resident and citizen of the State of Colorado, but had been for some time prior to the institution of this suit, residing in the City of Ft. Worth, Tarrant County, Texas, and that neither of the said parties, nor any of the defendants resided during any of said time in Collin County, Texas, and that none of the exceptions to exclusive venue in the county and place of the defendants' residence mentioned in Art. 1830 or Art. 2308 of the Revised Civil Statutes of the State of Texas, exists in this case.

Wherefore, these defendants pray that this cause be dismissed, or if the court thinks that any court in Texas has jurisdiction, that this case will be transferred either to the District Court of Tarrant County or of Johnson County, or of some county other than Collin County, as there are no true facts which would give this court jurisdiction over the case, and over these defendants, and they will ever pray.

S. C. PADELFORD,
JOHNSON & HARRELL,
Cleburne, Texas,
Attorneys for Defendant.

STATE OF TEXAS,
County of Collin:

Personally before me, the undersigned authority on this day
88 appeared Daniel Hewitt and F. C. Cotton, who for themselves and in behalf of their co-defendant, who being by me duly sworn, state that the facts set forth in the above and foregoing plea in abatement, and plea to the jurisdiction of this court, wherein stated as facts, are true, and where stated upon information and belief, they believe to be true.

F. C. COTTON,
DANIEL HEWITT.

Subscribed and sworn to before me this 18 day of September A. D. 1916.

[SEAL.] CLAUDE RENICK,
Notary Public, Tarrant Co., Texas.

Third.

And for further answer in this cause, if the same be necessary, and only in the event that the above exceptions to the jurisdiction of the court and the above plea in abatement shall be overruled, then in that event only, these defendants further answer herein, and for further answer here they except to the plaintiff's petition, and for such exception would show to the court as follows, to-wit:

(1) The said petition fails to set forth and contain sufficient facts authorizing the plaintiff to institute this suit and shows no cause of action in favor of the plaintiff against these defendants.

(2) That the plaintiff's petition is duplicitous and ambiguous and shows that it is a suit for the recision of trade between the plaintiff and the defendant, the Perry Coal & Lumber Company, and the defendant, Cotton, and it also is a suit for damages for deceit the law not permitting both of such suits to be brought by the same suit. There being a misjoinder of causes of action.

89 (3) The defendants except to all that portion of the plaintiff's petition in the 2nd paragraph thereof, wherein it alleges that the defendant had cheated a large number of Texas citizens, etc., because the same is slanderous, immaterial and improper, and does not tend to show any cause of action against these defendants.

(4) The plaintiff merely pleads a conclusion of law to the effect that the said abstract did not contain all of the chain of title or all of the title or evidence of title, and it fails to show what evidences of title said abstract failed to show, and it nowhere sets up any fact showing that the plaintiff was not the owner and did not have a good title to said lands in Kentucky; there are no allegations showing what was the chain of title that the defendant, Perry Coal & Lumber Company claimed to have to said Kentucky lands; there are no allegations showing wherein this defendant's title was defective; there are no allegations showing that the said defendants did not have title by the statute of limitation to said lands; there are no allegations in anyway showing wherein or how the said defendants corporation did not have title to said lands; the only allegations being conclusions of law and the said petition is altogether defective as the same fails to show any representation of title which was untrue and the same fails to show facts showing that any representation was untrue.

Wherefore, the defendants pray judgment *at* to the sufficiency of the plaintiff's petition.

S. C. PADELFORD,
JOHNSON & HARRELL,
Cleburne, Texas, Attorneys for Defendants.

90 Fourth.

And for further answer herein, if the same be necessary, and only in the event of the overruling of the defendant's exceptions to the jurisdiction and plea to the jurisdiction, these defendants deny each and every allegation set forth and contained in plaintiff's petition, and specifically deny each and every allegation of fraud set forth and contained in said petition, and they state that all of the allegations of fraud and of values set forth in plaintiff's petition are untrue, and they deny each and all of said allegations set forth in said petition, wherein it is sought to hold these defendants liable. And

they deny that they or each of them owe or are indebted to or responsible to plaintiff in any amount or sum whatsoever.

Wherefore, defendants pray that they go hence without day and recover their costs in this behalf, and that the pretended attachment in this case be dissolved, and they pray for all costs of suit, and general and special relief.

S. C. PADELFORD,
JOHNSON & HARRELL,
Cleburne, Texas, Attorneys for Defendants.

Endorsed: No. 7702. James R. Adams vs. F. C. Cotton et al. Defendants' Plea in Abatement and to the Jurisdiction and original Answer. Filed Sep. 19, 1916. A. S. Wheatley, clerk District Court, Collin Co., Texas.

THE STATE OF TEXAS,
County of Collin:

I, C. L. Sears, Clerk of the District Court of said County and State hereby certify that the above and foregoing is a true and correct copy of the Defendant's plea in Abatement and to the
91 Jurisdiction and Original Answer, in cause No 7702, wherein James R. Adams is plaintiff and F. C. Cotten et al are defendants as the same now appears on file in my office.

Witness my hand and seal of the District Court of Collin County, Texas, at office in the City of McKinney, Texas, this the 4th day of June A. D. 1917.

[SEAL.]

C. L. SEARS,
Clerk District Court, Collin County, Texas.

(Indorsements:) In Equity. No. 32. J. D. Collett, Trustee of the Estate of Ford C. Cotten, in Bankruptcy, vs. James R. Adams. Motions questioning jurisdiction and answer of defendant, James R. Adams. Filed June 6, 1917. L. C. Masterson, Clerk. By G. Predecki, Deputy. G. R. Smith, W. R. Abernathy, Solicitors for Defendant, McKinney, Texas.

92 *Plaintiff's Replication.*

Filed June 18, 1917.

In the District Court of the United States for the Southern District of Texas, Sitting at Galveston.

In Equity. No. 32.

J. D. COLLETT, Trustee of the Estate of Ford C. Cotten, in Bankruptcy,

vs.

JAMES R. ADAMS.

To the Judge of said Court:

1.

Now comes the plaintiff and moves the Court that he have judgment upon the defendant's answer because same shows upon its face that the property was owned by the bankrupt, Ford C. Cotten, and that the plaintiff had no attachment lien thereon. That a settlement was made preferring said Adams and that the agreement by which an attachment lien was left upon the property was fraudulent, void, unenforceable and made for the purpose of hindering delaying and defrauding creditors.

Wherefore, plaintiff prays that he have judgment for title and possession of said land and the money in the hands of the District Court of Collin County, Texas.

HUNT & TEAGLE,
Houston, Tex.,
SEAY & SEAY,
Dallas, Tex.,
Solicitors for J. D. Collett, Trustee.

Answering paragraphs 11, 13, and 19, wherein defendant pleads certain set offs, plaintiff denies that he is entitled to such set offs. That by the agreement of December 22nd, 1916, when the settlement
93 was made, said Adams did not assume the payment of any debts contracted by Cotten, and that if he has voluntarily assumed to pay any of said Cotten's debts, he did so of his own free will and accord, and such is not a liability against your Trustee, or this land. Your Trustee says that any valid liens, debts or claims against the land or the crops grown thereon incurred by said Ford C. Cotten prior to his bankruptcy that he is willing to recognize and pay in accordance with the Bankruptcy Law of 1898, as therein provided.

Wherefore, plaintiff prays judgment in accordance with his original prayer, and for such other relief as he may be entitled to.

HUNT & TEAGLE,
Houston, Texas,
SEAY & SEAY,
Dallas, Texas,
Solicitors for J. D. Collett, Trustee,

(Indorsements:) No. 32 in Equity. J. D. Collett, Trustee of the Estate of Ford C. Cotten, in Bankruptcy, vs. James R. Adams. Plaintiff's Replication Filed June 18, 1917. L. C. Masterson, Clerk. By G. Predecki, Deputy.

94 *Final Decree.*

Filed and Entered June 19, 1917.

In the District Court of the United States for the Southern District of Texas Holding Sessions at Galveston.

No. 32. In Equity.

J. D. COLLETT, Trustee of F. C. Cotton, Bankrupt,

vs.

JAMES R. ADAMS.

Be it remembered, that on this, 19th day of June, 1917, came on in open Court to be heard the motion of the defendant, James R. Adams, to dismiss this cause for lack of jurisdiction in this Court. And the Court having heard the motion, and arguments of counsel, and being fully advised in the premises, is of the opinion that said motion should prevail.

It is, therefore, considered by the Court, and so, ordered, adjudged and decreed, that the Bill of Complaint herein filed should be; and the same is, hereby dismissed; to which action of the Court the Complainant, in open Court, excepted, and gave notice of appeal to the Circuit Court of Appeals in and for the Fifth Circuit, and ninety (90) days after adjournment is allowed in which to perfect the record on appeal.

It is further ordered that the defendant James R. Adams have and recover his judgment for all costs of Court in this behalf expended, for which let execution issue. It is further ordered, adjudged and decreed that the officers of Court may have their executions against both plaintiff and defendant for the costs by them respectively incurred.

95

W. T. BURNS,
Judge.

Galveston, Texas, June 19, 1917.

(Indorsements:) No. 32 Eq. J. D. Collett, Trustee of F. C. Cotton, Bankrupt vs. James R. Adams. Final Decree Filed 19th day of June, 1917, L. C. Masterson, Clerk. By J. L. Sexton, Deputy.

96 *Petition for Appeal, and Order Allowing Same.*

Filed July 12, 1917.

In the District Court of the United States for the Southern District of Texas, Galveston Division.

No. 32. In Equity.

J. D. COLLETT, Trustee of the Estate of Ford C. Cotten, in Bankruptcy,

vs.

JAMES R. ADAMS.

To the Honorable Waller Burns, Judge of said Court:

The plaintiff, J. D. Collett, Trustee in the above styled and numbered cause, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 19th day of June, 1917, dismissing plaintiff's Bill for want of jurisdiction, same being the sole question heard and determined, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignments of error filed herewith, and prays that his appeal be allowed, and that citation be issued as provided by law and that a transcript of the record upon which said dismissal was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, under the rules in such court in such cases made and provided, and your petitioner further prays that the proper order relating to the required security be made.

HUNT & TEAGLE,
WILMER S. HUNT,
Of Houston, Texas,
SEAY & SEAY,
Of Dallas, Tex.,
Solicitors for J. D. Collett, Trustee in Bankrupcy.

Appeal allowed upon the question of jurisdiction alone, it being the only issue heard and determined, upon giving bond as
97 required by law for the sum of Five Hundred ($500.00) Dollars.

W. T. BURNS,
Judge.

(Indorsements:) No. 32. In Equity. J. D. Collett, Trustee of the Estate of Ford C. Cotten, In Bankruptcy vs. James R. Adams.

Petition for Appeal, and order allowing same. Filed July 12, 1917. L. C. Masterson, Clerk, by G. Predecki, Deputy.

98 *Assignments of Error.*

Filed July 12, 1917.

In the District Court of the United States for the Southern District of Texas, Galveston Division.

No. 32. In Bankruptcy.

J. D. COLLETT, Trustee of the Estate of Ford C. Cotten, in Bankruptcy,

vs.

JAMES R. ADAMS.

Now comes J. D. Collett, Trustee in the above entitled cause, and files the following assignments of error upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 19th day of June, 1917, dismissing plaintiff's Bill for a lack of jurisdiction, which was the sole issue heard and determined.

A.

The United States District Court for the Southern District of Texas erred in sustaining defendant's motion to dismiss for lack of jurisdiction for the following reasons, to-wit:

1.

The suit brought by James R. Adams against Ford C. Cotten, No. 7702, in the District Court of Collin County, Texas, was a suit for damages for alleged fraud perpetrated upon him by said Adams in an exchange of property. Said Adams having elected to sue for damages and not for rescission and cancellation was bound by said election, and his rights are governed by the same laws and rules governing any creditor holding an unsecured claim. The
99 agreement made between said Adams and Cotten under date of December 22nd, 1916, was within the condemnation of Sections 67-*e* and 70-*e* of the Bankruptcy Act of 1898 as amended by the Acts of 1903 and 1910. Said contract and agreement was fraudulent and constituted a fraud on the rights of third parties and showed upon its face that it was made with intent to hinder, delay and defraud creditors and third parties, and was subject to be set aside at the instance of the Trustee in Bankruptcy of the said Ford C. Cotten, and the Court erred in ruling that he had no jurisdiction.

2.

By the agreement made between Adams and Cotten on December 22nd, 1916, Adams waived his attachment lien, if he ever had a valid one, and the retention of said attachment lien, and the prosecution of suit No. 7702, James R. Adams vs. Ford C. Cotten, in the District Court of Collin County, Texas, and the possession of said property by said Adams constituted a fraud upon the rights of third parties, and was made with the purpose of hindering and delaying creditors, and was subject to be set aside at the instance of the Trustee. That under Section 47 of the Bankruptcy Act of 1898, as amended by the acts of 1910, the Trustee is a lien creditor and a bona fide purchaser for value and can attack as fraudulent and void such lien as was attempted to be retained and insisted upon by said Adams under the agreement of December 22nd, 1916. The Court erred in sustaining the motion to dismiss for the aforesaid reasons.

By the agreement of December 22nd, 1916, Adams waived his attachment lien and so much of said agreement as attempted to retain a lien upon the property is void and unenforceable, and the agreement by which said Adams went into possession of the
100 property he had attached, and exercising ownership thereof, constituted a preference within the purview of Section 67-*b* of the Bankruptcy Act of 1898, as amended by the Acts of 1910. That the facts alleged by plaintiff showed a preference within the purview of Section 67-*b* of said Bankruptcy Act, and the court erred in sustaining said motion to dismiss.

4.

The attachment as sued out by plaintiff, and as levied upon the land which plaintiff alleged was owned by Cotten, was void under the laws of Texas, and did not constitute an enforceable lien against said property, and the United States District Court for the Southern District of Texas has jurisdiction of the suit at the instance of the Trustee to attack such lien as being void and fraudulent under Section 70-*e* and Section 47 of the Bankruptcy Act as being void under the laws of Texas and subject to attack by any creditor, and the Trustee under Section 47 of the Bankruptcy Act, as amended, had a right to recover the property belonging to said Cotten and cancel any lien or encumbrance placed thereon through fraud, and the United States District Court for the Southern District of Texas erred in sustaining said motion to dismiss.

Wherefore, the appellant prays that said decree sustaining appellee's motion to dismiss be reversed.

HUNT & TEAGLE, &
WILMER S. HUNT,
Of Houston, Texas;
SEAY & SEAL,
Dallas, Tex.,
Attorneys for Appellant.

(Indorsements:) No. 32. In Equity. J. D. Collett, Trustee of the Estate of Ford C. Cotten, in Bankruptcy vs. James R. Adams. Assignments of Error. Filed July 12, 1917. L. C. Masterson, Clerk, by G. Predecki, Deputy.

101 *Bond on Appeal.*

Filed July 12, 1917.

In the District Court of the United States for the Southern District of Texas, Galveston Division.

No. 32. In Equity.

J. D. COLLETT, Trustee of the Estate of Ford C. Cotten, in Bankruptcy,

vs.

JAMES R. ADAMS.

Know all men by these presents, that we, J. D. Collett, Trustee in Bankruptcy of the estate of Ford C. Cotten, in Bankruptcy, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto James R. Adams in the sum of Five Hundred ($500.00) Dollars, lawful money of the United States, to be paud to him and his respective executors, administrators and successors; of which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated, this, the 30th day of June, 1917.

And, whereas, the above named J. D. Collett has prosecuted an appeal to the Supreme Court of the United States to reverse the decree of the District Court of the United States for the Southern District of Texas in the above entitled cause;

Now, therefore, the condition of this obligation is such that if the above named J. D. Collett, Trustee, shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then
102 this obligation shall be void, otherwise to remain in full force and effect.

J. D. COLLETT.
Trustee in Bankruptcy of Estate of Ford C. Cotten, Bankrupt.

SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By EDWARD G. ARMSTRONG,
Attorney-in-Fact.

Approved, this, the 11th day of July, 1917.

W. T. BURNS,
Judge.

(Indorsements:) No. 32. In Equity. Re J. D. Collett, Trustee of the Estate of Ford C. Cotten, in Bankruptcy, vs. James R. Adams. Cost Bond on Appeal. Filed July 12, 1917. L. C. Masterson, Clerk. By G. Predecki, Deputy.

103 *Clerk's Certificate.*

In the District Court of the United States for the Southern District of Texas, at Galveston.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignments of error, and all proceedings had in the case, in cause No. 32 on the Equity Docket of said Court, entitled J. D. Collett, Trustee of the Estate of Ford C. Cotten, in Bankruptcy, vs. James R. Adams, as the same now appears on file and of record in my office.

To certify which, witness my hand and seal of said Court, at Galveston, in said District, this the 30th day of August, A. D. 1917.

[Seal United States District Court, Southern District of Texas.]

L. C. MASTERSON,
Clerk U. S. District Court, Southern District of Texas.
By G. PREDECKI,
Deputy.

[Endorsed:] No. 32. In Equity. United States District Court, Southern District of Texas. J. D. Collett, Trustee of the Estate of Ford C. Cotten, in Bankruptcy, vs. James R. Adams. Copy of the record, assignments of error, and all proceedings had in the case.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States to James R. Adams and Messrs. W. R. Abernathy and G. R. Smith, Solicitors of record, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Supreme Court, according to law, within thirty days from the date of this writ, pursuant to an Order Allowing an Appeal, filed in the Clerk's office of the District Court of the United States for the Southern District of Texas, wherein J. D. Collett, Trustee of the Estate of Ford C. Cotten, in Bankruptcy, is Appellant, and James R. Adams is appellee, to show cause, if any there be, why the decree in said Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 15th day of August, A. D. 1917, and of the independence of the United States the 142nd year.

[Seal United States District Court, Southern District of Texas.]

W. T. BURNS,
United States District Judge.

105 [Endorsed:] (Original.) United States District Court, Southern District of Texas. No. 32. Equity Docket. J. D. Collett, Trustee of the Estate of Ford C. Cotten, in Bankruptcy, vs. James R. Adams. Citation on Appeal. Issued 15th day of August, 1917. L. C. Masterson, Clerk, by G. Predecki, Deputy. Returned and filed 28th day of August, 1917. L. C. Masterson, Clerk, by G. Predecki, Deputy.

Marshal's Return.

Received this writ on the 18th day of Aug., 1917, at Sherman, Texas. Executed it on W. R. Abernathy and G. R. Smith, by delivering a certified Copy of this writ to W. R. Abernathy, in person, at McKinney, Texas, on the 18th day of August, 1917.

B. F. SHERRELL,
U. S. Marshal,
By J. L. SATTERFIELD,
Deputy.

Endorsed on cover: File No. 26,151. S. Texas D. C. U. S. Term No. 684. J. D. Collett, trustee in bankruptcy of the estate of Ford C. Cotten, bankrupt, appellant, vs. James R. Adams. Filed September 15th, 1917. File No. 26,151.

Office Supreme Court, U. S.
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CLERK.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

TERM NO. [redacted]274

J. D. COLLETT, Trustee in Bankruptcy of the ESTATE OF FORD C. COTTEN,

Appellant,

v.

JAMES R. ADAMS,

Appellee,

BRIEF FOR APPELLANT.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

TERM NO. 684.

J. D. COLLETT, Trustee in Bankruptcy of the ESTATE OF FORD C. COTTEN,

Appellant,

v.

JAMES R. ADAMS,

Appellee,

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This suit was filed by Appellant May 12th, 1917, in the District Court of the United States for the Southern District of Texas at Galveston (Tr. p. 1).

The appellant is trustee of the estate of Ford C. Cotten, No. 964, pending in the United States District Court for the Northern District of Texas at Fort Worth. The appellee is a resident citizen of Collin County, Eastern District of Texas (Tr. p. 1).

The suit was brought under Section 70, Sub-division E, of the Bankrupt Act of 1898, as amended by the Acts of 1903, but the allegations in the appellant's bill are broad enough to bring the action also under Section 67-E of the Bankrupt Act of 1898, as amended by the Acts of 1903, and Section 60-B, of said Bankrupt Act (Tr. p. 2).

The appellant sought to recover 1071 acres of land located in Wharton County, Texas, in the Southern District of Texas, Galveston Division, of the value of Twenty Thousand Dollars ($20,000.00) (Tr. p. 5), and to cancel certain liens against the property. A receiver was asked for pendente lite and an injunction restraining appellee from proceeding with a suit in Collin County involving the same land, and for an accounting of the proceeds of the personal property delivered by the bankrupt, Cotten, to said appellee (Tr. p. 6).

Appellant alleges that on December 22nd, 1916, the bankrupt, Ford C. Cotten, was the owner in fee simple, and was in possession, of 1071 acres of land located in Wharton County, Texas, and fully described by metes and bounds in said petition (Tr. p. 2). That the appellee, James R. Adams, had theretofore sued Ford C. Cotten in suit No. 7702, in the District Court of Collin County, Texas, for $45,311.00. That in said suit appellee alleged that he had traded to Cotten said Wharton County land for certain lands located in Perry County, State of Kentucky, and that said Cotten did not deliver title to said Kentucky land, and that appellee had been deceived and defrauded to the extent of $45,311.00, the net market value of the Wharton County land (Tr. p. 3).

It was further alleged by the appellant that at the time of the institution of the suit in Collin County, Texas, said Cotten was a resident of Tarrant County, Texas, and at all times since. Appellee, Adams, caused a writ of attachment to be issued on his unliquidated claim and levied same during the month of August, 1916, upon the Wharton County land and upon all crops and person-

alty located thereon as the property of said Cotten. That at the time of the issuance of said writ of attachment and the levy thereon Cotten was the owner of said property, and that at the time of the said levy said Cotten was within the State of Texas, and that said appellee secured service of citation upon him (Tr. p. 3).

On December 22nd, 1916, the Collin County suit was pending and on said date the bankrupt and the appellee made a settlement in writing of said suit. By the terms of said agreement said Cotten waived any and all rights which he had to any of the crops grown on, or the revenue to be derived from the Wharton County land and agreed to transfer to said Adams all of said crops, or the proceeds thereof, and all revenue derived from said farm, for the year 1916, and to re-convey to said Adams and vest in him the title and possession of all the personal property on said farm except the seed rice planted in 1916. Cotten further agreed to make, execute and deliver a special warranty deed signed by himself and wife to the appellee to the Wharton County land. From the proceeds of the crops for the year 1916, was to be deducted the amount of a judgment obtained by the Frank Stevens Company, and a mortgage aggregating $2,000.00, held by one T. B. Butler, and a laborer's lien held by one A. L. Welch, for approximately $332.00. After paying these claims the appellee was to have the balance and it was to be paid into the registry of the District Court of Collin County, Texas. Said agreement contained the following stipulation: "It is further stipulated and agreed that four months after the deed from F. C. Cotten and wife to James R. Adams is filed for record, and four months after the extension of the

terms of this agreement, if no petition in bankruptcy has been filed against said F. C. Cotten, either voluntary or involuntary, the said James R. Adams will dismiss the above mentioned suit and pay all unpaid costs, and said James R. Adams agrees to file the deed from F. C. Cotten and wife to him for record in Wharton County immediately upon receipt of same, and if such proceedings be filed, and said F. C. Cotten be not adjudicated a bankrupt upon hearing, then this agreement shall be binding and said cause dismissed."

It was further stipulated and agreed that in the event bankrupt proceedings, either voluntary or involuntary, be had, seeking to declare said F. C. Cotten bankrupt, then in that event said James R. Adams shall prosecute his suit to judgment, retaining all attachment and garnishment liens heretofore acquired, and that in the event he gets a judgment, said attachment lien may be foreclosed on all of said premises and any net sum or sums received under this agreement for his own use, or that may be paid into the registry of the District Court, shall be credited upon any judgment which he may recover (Tr. pp. 3 and 4).

A true and correct copy of the petition as filed in the District Court of Collin County, Texas, is Exhibit "A" to the appellee's answer, and set out on pages 19 to 29 of the Transcript. A true and correct copy of the agreement made under date of December 22nd, 1916, is Exhibit "C" to the appellee's answer and set out on pages 46 to 49 of the Transcript.

Ford C. Cotten and wife executed and delivered a special warranty deed to appellee to the Wharton County land under date of December 22nd, 1916, and appellee

filed the same for record in Wharton County, Texas, December 27, 1916 (Tr. p. 4). The appellant further alleged that Cotten delivered all the personal property located on the real estate and the crops growing thereon to appellee, and that the appellee took possession of said land and premises and personal property and was claiming title thereto. That neither the bankrupt nor the appellee recorded the agreement of settlement made December 22nd, 1916.

On March 17th, 1917, an involuntary petition in bankruptcy was filed against Ford C. Cotten, who appeared and confessed his bankruptcy and was, on March 23rd, duly adjudged a bankrupt, and on April 28th, appellant was appointed trustee (Tr. p. 5). Appellant alleged that on December 22nd, 1916, Cotten was insolvent and by the transactions aforementioned he intended to create a preference in favor of the appellee. That appellee knew, and had reasonable cause to believe, that said Cotten was insolvent and the intention was to create a preference. That said transfer was based, if anything, upon an antecedent consideration, and was made within four months preceding the filing of the petition in bankruptcy, and that the property was subject to execution and was such property as the creditors of said Cotten had a right to have subrogated to their claims. That said transfer to appellee was fraudulent and that a preference has resulted, as there were not sufficient assets to pay all creditors (Tr. p. 5). Appellant further alleged that the agreement of December 22nd, was a secret agreement and was not recorded, and that the appellant was a bona fide purchaser for value. That the attachment lien was void, and if it ever was a valid lien, that part of the

agreement between Cotten and appellee which endeavors to preserve the lien at the time of the settlement was void, unenforceable, constitutes fraud on the rights of third parties and creditors, and was without consideration (Tr. p. 5).

Appellant further alleged that there was in the registry of the District Court of Collin County, Texas, $4,457.73, which was deposited there by the appellee, being the net amount left after the sale of the crops and after paying the claims which the bankrupt, Cotten, agreed might be deducted. Appellant pleaded that he did not know the gross amount derived from the sale of the crops, or the total amount deducted. That the matter was entirely in the hands of the appellee, Adams, his attorneys and representatives and the sheriff of Wharton County, acting under the directions of the appellee (Tr. pp. 4 and 5). Appellant wanted an accounting, prayed for a receivership of the property, and an injunction against the appellee from proceeding further with the case in Collin County, and for possession and title to the Wharton County real estate and personal property and funds coming into his possession from the sale thereof, and for the cancellation of the attachment lien, and for such other equitable relief as he might be entitled to (Tr. pp. 5 and 6).

The appellee filed his answer on June 6th, 1917, subject, however, to the following motion to dismiss (Tr. p. 8): "The plaintiff's bill shows upon its face that this court has no jurisdiction of the subject matter in this: Said bill shows upon its face that at the time of the commencement of this suit, and at the time of the service of the writ of subpoena issued thereunder, was made upon

this defendant, another suit was, and at all times herein mentioned has been, and is now, pending in the District Court of Collin County, State of Texas, No. 7702, between the said James R. Adams and the said Ford C. Cotten, et al, involving the same subject matter, and wherein the same relief is sought.

"That said bill shows that the suit pending in the District Court of Collin County, Texas, as aforesaid is for the sum of Forty-Five Thousand Three Hundred, and Eleven Dollars ($45,311.00), and that in said suit a writ of attachment was issued and levied upon the lands, and premises described in said bill, to-wit: The two tracts of land, consisting of 1069.8 acres, more or less, out of the Richard Boatright Survey, in Wharton County, Texas, together with all crops and property located thereon, as the property of the said F. C. Cotten and said attachment was issued and levied during the month of August, 1916, long prior to the filing of this bill, and more than four months before the filing of the petition in bankruptcy against said F. C. Cotten, and before he was adjudicated a bankrupt.

"First.

"The defendant, James R. Adams, does not consent to the adjudication of the matters complained of in plaintiff's bill, in this court, but objects thereto, and moves the court to dismiss said bill for the want of jurisdiction.

"Second.

"And now comes the defendant in the above styled cause, James R. Adams, and not waiving his objections to the adjudication of the matters set out in plaintiff's bill in this court, but insisting on the same, and files

this his answer to said bill, without prejudice to said objections and for answer says:

"That this court is without jurisdiction to hear and determine this case, because it appears from said bill that the bankruptcy of Ford C. Cotten is pending in the District Court for the Northern District of Texas, in the Fort Worth Division. That the said James R. Adams resides in Collin County, Texas, which is in the Eastern District of Texas of the United States District Court, and in the Sherman Division. That J. D. Collett, trustee, resides in Tarrant County, Texas, which is the Northern District of Texas, of the United States District Court. Wherefore, defendant James R. Adams, moves the court to dismiss this bill for want of jurisdiction."

Upon the hearing of said motion to dismiss for lack of jurisdiction, the court dismissed the bill upon the sole grounds that it was without jurisdiction to entertain same (Tr. p. 59).

This appeal is prosecuted for the sole purpose of reviewing the ruling of the District Court that it was without jurisdiction of the cause, which ruling represents the only question involved in the order of dismissal (Tr. pp. 59 and 60).

SPECIFICATIONS OF ERROR.

I.

The suit brought by James R. Adams against Ford C. Cotten, No. 7702, in the District Court of Collin County, Texas, was a suit for damages for alleged fraud perpetrated upon him by said Adams in an exchange of

property. Said Adams having elected to sue for damages and not for rescission and cancellation was bound by said election, and his rights are governed by the same laws and rules governing any creditor holding an unsecured claim. The agreement made between said Adams and Cotten under date of December 22nd, 1916, was within the condemnation of Sections 67-e of the Bankruptcy Act of 1898 as amended by the Acts of 1903 and 1910. Said contract and agreement was fraudulent and constituted a fraud on the rights of third parties and showed upon its face that it was made with intent to hinder, delay and defraud creditors and third parties, and was subject to be set aside at the instance of the Trustee in Bankruptcy of the said Ford C. Cotten, and the Court erred in ruling that he had no jurisdiction.

II.

By the agreement made between Adams and Cotten on December 22nd, 1916, Adams waived his attachment lien, if he ever had a valid one, and the retention of said attachment lien, and the prosecution of suit No. 7702, James R. Adams v. Ford C. Cotten, in the District Court of Collin County, Texas, and the possession of said property by said Adams constituted a fraud upon the rights of third parties, and was made with the purpose of hindering and delaying creditors, and was subject to be set aside at the instance of the trustee. That under Section 47 of the Bankruptcy Act of 1898, as amended by the Acts of 1910, the trustee is a lien creditor and a bona fide purchaser for value and can attack as fraudulent and void such lien as was attempted to be retained and insisted upon by said Adams under the agree-

ment of December 22nd, 1916. The court erred in sustaining the motion to dismiss for the aforesaid reasons.

III.

By the agreement of December 22nd, 1916, Adams waived his attachment lien and so much of said agreement as attempted to retain a lien upon the property is void and unenforceable, and the agreement by which said Adams went into possession of the property he had attached, and exercising ownership thereof, constituted a preference within the purview of Section 60-b of the Bankruptcy Act of 1898, as amended by the Acts of 1910. That the facts alleged by plaintiff showed a preference within the purview of Section 60-b of said bankruptcy Act, and the Court erred in sustaining said motion to dismiss.

IV.

The attachment as sued out by plaintiff, and as levied upon the land which plaintiff alleged was owned by Cotten, was void under the laws of Texas, and did not constitute an enforceable lien against said property, and the United States District Court for the Southern District of Texas has jurisdiction of the suit at the instance of the trustee to attack such lien as being void and fraudulent under Section 70-e and Section 47 of the Bankruptcy Act as being void under the laws of Texas and subject to attack by any creditor, and the trustee under Section 47 of the Bankruptcy Act as amended, had a right to recover the property belonging to said Cotten and cancel any lien or encumbrance placed thereon through fraud, and the United States District Court

for the Southern District of Texas erred in sustaining said motion to dismiss.

EXPLANATION.

In filing his specifications of error in the lower court, appellant did not number specification of error No. 3, but it appears as a paragraph under Specification of Error 2. In the intended Specification of Error No. 3, Section 60-b of the Bankruptcy Acts, relating to preferences, was erroneously referred to as Section 67-b. These clerical errors are corrected in the above list of Specifications of Error.

BRIEF OF ARGUMENT.

SPECIFICATIONS OF ERROR.

(1)

The suit brought by James R. Adams against Ford C. Cotten, No. 7702, in the District Court of Collin County, Texas, was a suit for damages for alleged fraud perpetrated upon him by said Adams in an exchange of property. Said Adams having elected to sue for damages and not for rescission and cancellation was bound by said election, and his rights are governed by the same laws and rules governing any creditor holding an unsecured claim. The agreement made between said Adams and Cotten under date of December 22nd, 1916, was within the condemnation of Sections 67-e and 70-e of the Bankrutcy Act of 1898 as amended by the Acts of 1903 and 1910. Said contract and agreement was fraudulent and consituted a fraud on the rights of third parties and showed upon its face that it was made with intent to hinder, delay and defraud creditors and third

parties, and was subject to be set aside at the instance of the trustee in bankruptcy of the said Ford C. Cotten, and the court erred in ruling that he had no jurisdiction.

FIRST PROPOSITION.

Where a party who has bought or traded for property and has been damaged on account of fraudulent representations, he has the choice of two remedies; first, to sue for rescission and cancellation; second, he may affirm the contract and sue for damages. And, where he elects to sue for damages he is governed by the same laws governing any creditor holding an unsecured claim. His affirmance of the contract and suit for damages will preclude him from rescinding the contract.

AUTHORITIES.

Simon v. Goodyear Metallic Rubber Shoe Company, 105 Fed. 573; 44 C. C. A. 612; 52 L. R. A. 475.

Kingman v. Stoddard, 85 Fed. 740; 29 C. C. A. 413.

Wilson v. New United States Cattle Ranch Co., 73 Fed. 994; 20 C. C. A. 241.

South Covington Ry. Co. v. Gest, 34 Fed. 628.

Guinn v. Ames, 83 S. W. 232.

Blythe v. Speake, 23 Tex. 429.

Mitchell v. Zimmerman, 4 Tex. 75.

Mills v. Johnson, 22 S. W. 530.

Aultman v. Heffner, 67 Tex. 54; 2 S. W. 861.

Scalf v. Tompkins, 61 Tex. 476.

Routh v. Caron, 64 Tex. 289.

ARGUMENT.

The appellee, Adams, in bringing his suit in the District Court of Collin County, had the election of two

remedies, to-wit: First, he could have repudiated the contract and tendered back what he received and recovered what he had prayed for, or its value; or, second, he had the right to affirm the contract, keeping whatever property or advantage he had derived under it, and may recover in an action for deceit, or damages caused by the fraud, or if what he had received was worthless, as he did allege in said suit in Collin County, he could affirm the contract and sue for his damages. This he did. He proceeded upon the theory that the Kentucky lands were worthless on account of an alleged failure of title, and sued the bankrupt, Ford C. Cotten, for $45,311.00, being the alleged value over and above the encumbrances against said property. Now, having elected to sue for his damages instead of suing to rescind and cancel, his rights as to the Collin County suit will be determined and governed by laws governing suits sounding in tort or deceit, and unsecured claimants.

SECOND PROPOSITION.

Where a creditor having the choice of affirming a contract and suing for damages, or of suing to rescind and cancel, and such creditor elects to affirm and sue for damages, any agreement made within four months prior to the filing of the petition in bankrutcy by which said suit is to be settled by the transfer or encumbrance of the bankrupt's property, and is done with the intent to hinder, delay and defraud other creditors, or any of them, is null and void except as to purchasers in good faith and for a present and fair consideration. And if said property is not exempt from execution and liable for debts, by the law of the debtor's domicile, it passes to

the trustee, whose duty it is to recover same for the benefit of creditors. And where a bankrupt within four months prior to the filing of a petition against him, and while insolvent, conveys, transfers or encumbers his property, and where such are held null and void as against creditors of such debtor by the law of the state where the property is situated, is null and void, and where any creditor could have avoided such a transfer or encumbrance, the trustee may recover same or its value from whoever may have received it except a bona fide holder for value. And for the purpose of such recoveries by the trustee, any court of bankruptcy, as defined by the Bankrupt Act of 1898, has jurisdiction of said suit.

AUTHORITIES.

Bankrupt Act of 1898, Section 67-E, as amended in 1903.

Bankrupt Act of 1898, Section 70-E, as amended in 1903.

Collier on Bankruptcy, ninth edition, pages 927, 928, 951, 659, 988, 1039, 1042.

Revised Statutes of Texas, Article 3966.

Jonah Coder, trustee, v. Williams, Art. 213 U. S. 223; 53 L. Ed. 772.

Whitesides v. Baker, 150 S. W. 301.

Awalt v. Schooler, 131 S. W. 302.

Hillboldt v. Waugh, 47 S. W. 829.

ARGUMENT.

While the attachment suit was pending and within four months of the filing of the petition in bankruptcy against Ford C. Cotten, the bankrupt and appellee made

a settlement by which the subject matter of this suit should be turned over to the appellee, which was done, and at the same time entered into a written stipulation in substance that if within four months a petition in bankruptcy should be filed against said Cotten, then he, the said appellee, would proceed with his suit as originally brought, but if no such petition in bankruptcy was filed, then at the expiration of four months from the making of the agreement, the settlement was to be made final, and the suit in Collin County dismissed. Adams was, if anything, only an unsecured creditor holding an alleged attachment lien, and such a settlement shows upon its face that it was made for the purpose of hindering, delaying and defrauding other creditors, and that both Cotten and Adams participated in that intent. Their written stipulations show that bankruptcy was contemplated. The appellee, Adams, took all the subject matter of this suit, and at the same time attempted to engraft a condition upon the same that if a petition in bankruptcy was filed against Cotten, that he should retain all the fruits of the settlement, and at the same time prosecute the suit as originally brought. He endeavored to avoid these provisions of the Bankrupt Act enacted for the protection of other creditors, and sought with Cotten to take the property and engraft conditions upon the settlement which show that the settlement was made for the purpose of hindering, delaying and defrauding other creditors of the bankrupt Cotten.

Section 67-E of the Bankrupt Act of 1898 as amended by the Acts of 1903 is as follows:

"That all conveyances, transfers, assignments or

encumbrances on his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void against the creditors of such debtor except as to purchasers in good faith, and for a present and fair consideration, and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid, shall if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings, or otherwise, for the benefit of creditors, and all conveyances, transfers or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which said property is situated, shall be deemed null and void under this Act against a creditor of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any Court of Bankruptcy, as hereinbefore defined, and any State Court which would have had

jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section 70-E as amended by the Act of 1903 is as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered, or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction."

Article 3966 of the Revised Statutes of the State of Texas is as follows:

"Every gift, conveyance, assignment or transfer of or charge upon any estate, real or personal, from suit commenced, or decree, judgment or execution suffered or obtained, and from bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons, of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not effect the title of a purchaser for valuable consideration unless it appears that he had notice of the fraudulent intent of his immediate

grantor, or of the fraud rendering void the title of such grantor."

It is held by the courts of this State that this article means that all sales made by an insolvent debtor to hinder, delay anl defraud creditors, when such intention is known to the purchaser, or could have been known by the use of ordinary diligence, are void as against the creditors of the vendor although the purchaser may have paid a valuable consideration. An insolvent debtor may transfer property to a creditor in payment of a debt provided the creditor receiving the property acts in good faith and takes the same for the sole purpose of collecting a bona fide debt, though the effect of the transaction is to hinder and delay other creditors. Whitesides v. Baker, 150 S. W. 301; Awalt v. Schooler, 131 S. W. 302; Hillboldt v. Waugh, 47 S. W. 829.

It is evident from the agreement of December 22nd, 1916, that the attachment lien, if it was ever valid, would have nothing to do with the title of the appellee. He either had his suit in Collin County, or he settled it by taking over the subject matter of this suit. That he well knew and understood the legal consequences of such a settlement, and that such a settlement was a fraud upon the rights of other creditors, is evidenced by his endeavor to circumvent the legal result of his action by stipulating that the settlement was to be void if within four months a bankruptcy suit was instituted. Appellant alleged that the property was non-exempt and subject to execution, and it was, therefore, such property as passed to the trustee, and under the plain terms of Sections 67-E and 70-E, it was his duty to institute suit

therefor. The property was located in Wharton County, in the Southern District of Texas, Galveston Division, and the suit was, therefore, properly laid in the United States District Court for the Southern District of Texas.

SPECIFICATION OF ERROR.

(2)

By the agreement made between Adams and Cotten on December 22nd, 1916, Adams waived his attachment lien, if he ever had a valid one, and the retention of said attachment lien, and the prosecution of suit No. 7702, James R. Adams v. Ford C. Cotten, in the District Court of Collin County, Texas, and the possession of said property by said Adams constituted a fraud upon the rights of third parties, and was made with the purpose of hindering and delaying creditors, and was subject to be set aside at the instance of the trustee. That under Section 47 of the Bankruptcy Act of 1898, as amended by the Acts of 1910, the trustee is a lien creditor and a bona fide purchaser for value and can attack as fraudulent and void such lien as was attempted to be retained and insisted upon by said Adams under the agreement of December 22nd, 1916. The Court erred in sustaining the motion to dismiss for the aforesaid reasons.

FIRST PROPOSITION.

Where an attachment creditor in a State Court makes a settlement with the attachment debtor and under the settlement the attachment creditor takes over the property attached and goes into possession thereof, but with the understanding that if within four months a petition in bankruptcy is filed against the attachment debtor,

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then the attachment creditor may proceed with the original suit foreclosing his attachment lien, then by such an arrangement the attachment creditor waives his attachment lien, and the State Court loses jurisdiction and custody of the property, and such a settlement constitutes a fraud upon the rights of third parties and is made with the purpose and intent of hindering, delaying and defrauding creditors, and was subject to be set aside at the instance of the trustee, and a District Federal Court where the real estate is situated has jurisdiction to hear and determine the suit of the trustee.

AUTHORITIES.

Monroe v. St. Germain, 69 N. H. 200; 42 Atl. 900.

Cudahay v. Rhinehart, 130 N. Y. 248; 30 N. E. 1004.

Butler v. White, 25 Minn. 432.

Upper Canada Bank v. Spafford, 3 U. C. B. Q. O. S. 78.

Van Loan v. Kline, 10 John 129.

Stark v. Curd, 10 S. W. 419.

Marr v. Washburn, 44 N. E. 1062; 4 Cyc. 630; 6 C. J. 276.

Sullivan v. Cleveland, 62 Tex. 677.

Kollett v. Seibel, 26 S. W. 863.

Bateman v. Ramsey, 12 S. W. 235.

Johnson v. Heidenheimer, 65 Tex. 263.

In Re Zeis, 229 Fed. 272.

In Re Monarch Co., 229 Fed. 474.

Morten v. Allen, 5 Ky. L. 601.

In Re Thackara, 140 Fed. 126.

ARGUMENT.

Under the plain terms of the agreement of December 22nd, 1916, between Cotten and Adams, the trustee

would be entitled to possession of the land because Adams could not at the same time hold the land and claim that he was endeavoring to foreclose his attachment lien. It will be noted from his pleadings (Tr. p. 18), that he states that he will not give up the land until forced to do so by a judgment of the court. The appellant, however, contends that appellee does not even have an attachment lien. That the agreement by which the attachment lien was to be retained and the land turned over to the appellee, was not only made with the intent to hinder, delay and defraud creditors and third parties, but by his actions in so taking the land and going into possession thereof, that he waived, abandoned and released his attachment lien. The above citations lay down the law to be that an attachment creditor waives his attachment lien by delay, laches and following inconsistent remedies. A creditor may lose his attachment lien by permitting his case to ride indefinitely. It is held in Marr v. Washburn, supra, that a creditor waives his attachment lien by giving assent to a deed to a trustee for the benefit of creditors. Arresting the debtor is inconsistent with the continuation of the attachment and, therefore, shows that it has been abandoned. An attachment creditor will waive his lien by allowing a debtor to take charge of the attached property under an agreement to make quarterly payments, with the proviso that if any other creditor undertakes to subject the property, it shall revert to the original attaching creditor. Such an agreement is a fraud upon the other creditors, 5 Ky. L. 601; 6 C. J. 276.

It is held in Sullivan v. Cleveland supra, that where a creditor runs an attachment and has no present intention

of pursuing said attachment, but endeavors by other means to secure his debt, he loses his lien.

In Re Zeis and in Re Monarch Co., supra, decide that any action on the part of the plaintiff in execution and dealing with the execution lien in a way which would hinder, delay and defraud creditors, waives the execution lien, and where an execution lien was obtained more than four months prior to the petition in bankruptcy, and a settlement was made within four months with the understanding that if the settlement was not consummated, the execution liens were to be retained, it was held that the liens were released, and that the settlement was in fraud of the rights of third parties.

To the same effect is in re Thackara, 140 Fed. 126:

> "On February 18, 1903, the bankrupt confessed judgment to the claimant, the Pittsburg Steel Shafting Company, for $4,153.91, and on the same day an execution was issued thereon. Soon afterward an agreement was entered into between the claimant and the bankrupt, by which it was provided that the execution should be stayed and that the bankrupt should pay $50.00 per week and maintain its stock and manufacturing plant without impairment, except as changes might be made in the course of its regular and legitimate business. If default in the weekly payments should be made the claimant was to have the right to issue a second writ of execution. After $2,800.00 had been paid this way default was made, and on February 23, 1904, claimant issued an alias execution. Other writs in favor of other creditors were in the sheriff's hands at the time and the bankrupt owed for rent, etc., which

would be preferred claims in the proceeds of any sale by the sheriff. These things made the financial condition of the bankrupt so unsatisfactory that nothing but a formal levy was made and claimant's attorney told the sheriff not to sell, and had sheriff withdraw his watchman from the premises. He did not formally withdraw the writ, but informally agreed to take no steps under it provided bankrupt made payments. Under this state of facts bankrupt did in fact pay $750.00 on January 3rd, 1905. The concern was declared bankrupt and the goods above levied on were sold by the receiver in bankruptcy and the claimant asserts a right to be paid in full out of the assets realized from this sale, on the ground that a lien had been acquired on the property by the above levy more than four months before the filing of the petition in bankruptcy.

"Held by the Court: That this claim was not entitled to priority because under the law of Pennsylvania such a levy as above creates no lien. Quoting from Corlies v. Stanbridge, 5 Rawle 286, (Pa.), the Court says: 'If the plaintiff delivers an execution to the sheriff with directions not to levy at all, or not until further orders, it creates no lien upon the defendant's personal property as against a creditor issuing and proceeding with a subsequent execution. The rule is the same if there is a levy accompanied with instructions to stay proceedings. In both cases the plaintiff's object is considered to be to obtain security, not satisfaction for his debt, and the employment of an execution

for this purpose is a perversion of its design and a fraud against third persons."

It is incumbent upon an execution or an attachment creditor to follow consistent remedies. Any action which he may take by which he makes a settlement and at the same time endeavors to retain his lien, especially when it contemplates the four months period of bankruptcy, is a fraud upon the rights of third parties, and such property passes to the trustee to be recovered in the United States District Court

The suit pending in the District Court of Collin County had nothing whatever to do with the action brought by appellant. The property sued for was not in custody of said court nor did the appellee have an attachment lien thereon, but he held same himself personally, and the trustee instituted the suit in the proper forum when he brought it in the United States District Court.

SECOND PROPOSITION.

The trustee is a lien creditor and a bona fide purchaser for value and where an attachment creditor in a State court makes a settlement and takes a deed to the real estate attached and records same in the county where the land is located, and at the same time makes a secret agreement with the bankrupt that the settlement shall be of no effect, if a petition in bankruptcy were filed within four months, then such a transfer is fraudulent and void as to third parties, and the United States District Court sitting in the district where the land is located has jurisdiction to entertain the suit of the trustee brought to recover said property.

AUTHORITIES.

Section 47 of the Bankrupt Act of 1898 as amended by the Acts of 1910.

In Re Zeis, 229 Fed. 472.

In Re Monarch Company, 229 Fed. 474.

Acme Harvester Company v. Beekman, 220 U. S. 300; Jones v. Springer, 226 U. S. 155.

Fairbanks v. Wills, 240 U. S. 649.

Art. 6824 Revised Statutes of Texas.

ARGUMENT.

Section 47 of the Bankrupt Act of 1898, as amended in 1910, provides as follows:

> "Such trustee as to all property in the coustody, or coming into the custody, of the bankrupt court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all property not in the custody of the bankrupt court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned and satisfied."

By said amendment the appellant in this case is a bona fide holder for value and is not chargeable with the secret reservation made between Adams and Cotten as to the attachment lien, assuming, of course, the said reservation to be valid.

The above authorities cited from the Supreme Court are cases decided under Section 47, holding that a trustee is a bona fide purchaser for value. The trustee is not bound by any agreement, mortgage, or otherwise, affecting property in his possession, or coming into his

possession, which was by the law of the state where made such instrument as was required to be recorded. Under the laws of Texas all liens affecting real estate must be recorded in the county where the land is located if it is to effect a bona fide purchaser for value. The deed from Cotten to Adams was all that was ever recorded, and in so far as the records of Wharton County would show, the title was in Adams. The agreement of December 29th, 1916, was never recorded (Tr. p. 4).

Article 6824, of the Revised Statutes of Texas, is as follows:

> "All sales, etc., to be void as to creditors and purchasers, unless registered. All bargains, sales and other conveyances, whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as all subsequent purchasers, with notice thereof or without valuable consideration, shall nevertheless be valid and binding."

We quote as follows from in re Zeis, supra:

> "The referee in Bankruptcy sustained the objections of the trustee to the claim of McCarthy Bros. & Ford to proceeds realized on sale of certain

property of the bankrupt which had been levied upon by the sheriff of Erie County more than four months before the filing of the petition. The claim was disallowed on the ground that the execution lien had become dormant and was unenforceable against the trustee at the time the petition was filed.

"The law is that a lien on personal property levied upon by virtue of an execution four months before bankruptcy intervenes is not lost unless the plaintiff does something to hinder, delay, or defraud other creditors. No actual intent need be shown. A mere acquiesence in adjournments of the sale by the sheriff has been held insufficient to render a lien dormant, but in this case the referee has found on the evidence before him that there would have been no adjournment of the sale without the consent of the petitioning creditors, and that such consent, on the authority of Excelsior Company v. Globe Cycle Works, 48 App. Div. 304, 62 N. Y. Supp. 538, was the equivalent of a direction to the sheriff to adjourn it, and thus the other creditors were hindered or delayed. In the absence of any other explanation accounting for such delay I incline to the view that the referee was correct in his conclusion. It makes no essential difference that the instructions to the sheriff to adjourn the sale were not in writing or that there was no request made to him, as in the Globe Cycle Works Case, to release any portion of the property. The evidence showed that the execution in favor of the petitioning creditor was issued in October, 1912,

the property levied upon and advertised for sale, and that afterwards, the execution sale was adjourned about 18 different times, until March, 1913, when an injunction issued in this proceeding. Under these circumstances there was such delay in the enforcement of the execution as to render the execution lien dormant against later execution creditors and the trustee in bankruptcy. Freeman on Executions (3rd Ed.), Vol. 2, Sec. 206.

"The referee was right, too, in holding that the execution lien, although acquired more than four months before bankruptcy intervened, was subject to attack by the trustee. By the amendment of 1910 to Section 47 of the Bankruptcy Act the trustee was vested with the rights, remedies, and powers of a creditor holding a lien. He was in the precise situation of a junior judgment creditor with an execution lien, and had a right to invalidate a preceding lien either for laches, fraud, or dormancy as of the date of the filing of the petition in bankruptcy. Matter of Lane Lumber Company, 213 Fed. 587, 130 C. C. A. 167, 32 Am. Banker, R. 469. Counsel for petitioner attaches importance to the case of Bailey v. Baker Ice Machine Co., 239 U. S. 269, 36 Sup. Ct. 50, 60 L. Ed. But I think that case was decided upon another principle. It concerns a conditional contract of sale which had been filed within the four months period, and the Supreme Court of the United States held that as the contract was recorded under the recording act of the State the trustee could not assail it."

The Writ of Attachment directed to the sheriff of

Wharton County and the return thereon is set out as Exhibit "B" to appellee's answer (Tr. pp. 40, 41, 42).

The Writ of Attachment commanded the sheriff "that you attach forthwith so much of the property of F. C. Cotten, Perry Coal & Lumber Company and Daniel Hewitt if to be found in your County repleviable on security, as shall be sufficient to make the sum of $45,311.00, and the probable costs of suit, to satisfy the demand of James R. Adams, and that you keep and secure in your hands the property so attached unless replevied, that the same may be liable to further proceedings thereon to be had before our court in the City of McKinney, in the County of Collin, on the third Monday in September, 1916, same being the 18th day, when and where you shall make known how you have executed this writ."

To say the least of it, appellant's allegations show that the sheriff neither had actual or constructive possession of said property, and that appellee took same out of his possession, and after the settlement of December 22nd, 1916, no semblance of an attachment remained.

SPECIFICATION OF ERROR.

(3)

By agreement December 22, 1916, Adams waived his attachment lien and so much of said agreement as attempted to retain a lien upon the property is void and unenforceable, and the agreement by which said Adams went into possession of the property he had attached and was exercising ownership thereof, constituted a preference within the purview of section 60b of the Bankruptcy Act of 1898 as amended by the Acts of 1910; that the facts alleged by plaintiff showed a preference with-

in the purview of Section 60-b of said Bankruptcy Act and the court erred in sustaining said motion to dismiss.

FIRST PROPOSITION.

Where a creditor in a State Court waives his attachment lien within four months of the filing of a petition in bankruptcy against the attachment debtor, and made a settlement by which he took over certain real estate and other property in settlement of the suit, and where such creditor knew at the time he made the settlement that the debtor was insolvent, or had reasonable cause to believe that he was insolvent, and that the taking of such property would constitute a preference within the purview of Sections 60-B of the Bankruptcy Act of 1898, as amended by Act of 1910, such property passed to the trustee of the debtor to be recovered in a suit brought against the creditor in the United States District Court.

AUTHORITIES.

Bankruptcy Act of 1898 as amended, Sections 60-B.

ARGUMENT.

Section 60-B, of the Bankruptcy Act of 1898, as amended in 1903 and 1910 is as follows:

> "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in

bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

If the attachment creditor waived his lien and made a settlement within four months of the filing of the petition in bankruptcy, then if the trustee was able to show that the settlement was a preference within the purview of Section 60-B, then the United States District Court for the Southern District of Texas had jurisdiction. We have shown, we think, that if he ever had a lien he waived it, and the petition shows that he was in possession of this property, and was in possession by virtue of an agreement of settlement made within four months of the filing of the petition in bankruptcy (Tr. p. 4). The District Court of Collin County, Texas, therefore, had no jurisdiction whatever of the matter and the trustee brought his suit in the proper forum.

The appellant takes the position that the attachment lien, if there ever was a valid one, was waived by the settlement made under date of December 22nd, 1916,

and the State Court lost jurisdiction and custody of the res, and the taking over of the subject matter of this suit by the appellee constituted a preference within the purview of the bankruptcy act. The allegations of appellant's petition show a preference (Tr. p. 15), and if he had been permitted to do so, would have shown that the appellee, Adams, knew, or had reasonable cause to believe, that he was securing a preference, and as a matter of fact the agreement itself showed that he knew Cotten was insolvent and was endeavoring to protect himself in the event a petition was filed within four months.

SPECIFICATION OF ERROR.

(4)

"The attachment as sued out by plaintiff, and as levied upon the land which plaintiff alleged was owned by Cotten, was void under the laws of Texas, and did not constitute an enforceable lien against said property, and the United States District Court for the Southern District of Texas has jurisdiction of the suit at the instance of the trustee to attack such lien as being void and fraudulent under Section 70-e and Section 47, of the Bankruptcy Act and being void under the laws of Texas and subject to attack by any creditor, and the trustee under Section 70-e of the Bankruptcy Act, as amended, had a right to recover the property belonging to said Cotten and cancel any lien or encumbrance placed thereon through fraud, and the United States District Court for the Southern District of Texas erred in sustaining said motion to dismiss."

FIRST PROPOSITION.

Where parties traded lands and one of the parties

feeling that he had been defrauded elected to affirm the contract and sue in the State Court for his damages, said suit was on an unliquidated demand, and where the defendant was a resident citizen of Texas and an attachment was sued out by the plaintiff and levied upon certain land and personal property, said attachment was void and unenforceable. And where pending a hearing on the suit and within four months of the date of the petition in bankruptcy being filed against the attachment debtor the property attached is transferred to the attachment creditor in settlement of the suit, and the deeds are recorded in the County where the land is located, and where the plaintiff and defendant entered into a written agreement, which was not recorded, to the effect that the transfers were to be void if a petition in bankruptcy was filed within four months against the attachment debtor, then in that event said property is not in the custody of the State Court, and the United States Court sitting in the district where the land is located has jurisdiction to hear and determine a suit instituted by the attachment debtor's trustee seeking to set aside said transfer on the grounds of a preference and on the further grounds that the agreement between the attachment creditor and debtor was made in fraud of the rights of third parties, was void under the Texas law and subject to the attack of any creditor, or the debtor's trustee in bankruptcy.

AUTHORITIES.

Section 47 of the Bankruptcy Act of 1898, as amended.

Bank of El Paso v. Tucks, 34 S. W. 206.

Hochstadder v. Sam, 11 S. W. 408.
Thomas v. Ellison, 116 S. W. 1141.
Revised Statutes of Texas, Article 247-a.
Kollette v. Siebel, 26 S. W. 863.
Dabney v. Ramsey, 12 S. W. 235.

ARGUMENT.

Under Section 47 of the Bankruptcy Act a trustee is a lien creditor. We have previously shown that if the attachment was ever valid it was waived by the settlement under date of December 22nd, 1916, and appellant would be a lien creditor within the purview of Section 47, and would not be bound by the agreement that the settlement of December 22nd, 1916, was to be of no effect in case of the filing of a petition in bankruptcy within four months, and could, therefore, sue for the recovery of the property under Sections 60-b, 67-e and 70-e, as the records of Wharton County showed title in appellee, and had nothing of record to indicate that appellee was endeavoring to preserve a lien in addition to his title. The basis of appellee's suit in the District Court of Collin County was on an unliquidated demand. An attachment cannot be predicated upon an unliquidated demand except by virtue of Article 247-a, of the Revised Statutes of Texas, as follows:

> "Provided that nothing in this Chapter shall prevent the issuance of attachments on suits against persons, co-partnerships, associations or corporations upon whom personal service cannot be had within this State founded in tort, or upon demands which are unliquidated, but where the demand is unliquidated the amount of the bond to be made by

the plaintiff shall be fixed by the judge or clerk of the court, or by the Justice of the Peace issuing the attachment, and the bond shall be made in the sum so fixed, and upon the approval and filing of same the attachment shall issue as in other cases."

The appellant alleged that at the time of the institution of the suit in Collin County, and at the time of the levy of the writ of attachment, the bankrupt, Cotten, was residing in Tarrant County, Texas, and was served with a citation out of the Collin County suit (Tr. p. 3). The attachment, therefore, had no basis and was void from its very inception. Said attachment was void on the face of the record and was not such a proceeding of which the appellant was required to take notice. Inasmuch as such attachment was void there could have been nothing predicated upon it in the settlement of December 22nd, 1916, by which appellee got anything, and the settlement under date of December 22nd, 1916, made within the four months, and consequently can be attacked under Sections 60-b, 67-e and 70-e by appellant.

The cases of Bank of El Paso v. Tucks, Hochstadder v. Sam and Thomas v. Ellison are all from the Supreme Court of Texas. The last case cited was a case similar to the Adams-Collett suit in Collin County. The plaintiff in the case had sued for damages on account of fraud practiced upon him in a land trade. The court says, "the cause of action for the recovery of damages for the deceit practiced was for a tort and not for a debt in the sense of the attachment law, and it constitutes no lawful basis for the writ."

Inasmuch as the attachment if ever valid was waived, and for the further reason that it was void, the District Court of Collin County never acquired jurisdiction of the subject matter, and if it did acquire same under the writ of attachment, it was released and waived by the settlement of December 22nd, 1916, and said court did not have jurisdiction of the subject matter at the time appellant instituted his suit in the United States District Court for the Southern District of Texas, and such suit interfered in no way with the Collin County Court.

The claim was on an unliquidated demand and formed no basis whatever for an attachment. It has been held in Texas that a lien of attachment obtained on grounds known to be false by the attaching creditors when they made their affidavit will be postponed for the lien of subsequent attachment creditors in good faith on the same property. Kollette v. Siebel, supra, 26 S. W. 863.

In Bateman v. Ramsey, supra, it was held that in a suit to foreclose an attachment, a junior attaching creditor might intervene and show that plaintiff's attachment was fraudulent, and if they should establish that the grounds therefor did not exist, and that plaintiff's affidavit was false, the plaintiff would be entitled to a personal judgment for his debt but not to a judgment foreclosing his attachment except for any surplus which might remain after the satisfaction of the attachment of the intervening creditors. The attachment being issued on an unliquidated demand was, of course, fraudulently procured, and having such a basis is absolutely void, and one which a bona fide holder for value, such as

the trustee in this case is not required to take notice of. If the attachment proceedings had not been voidable, intervening creditors, such as the trustee, might have been required to intervene in the Collin County suit, and set up their claims, and proceeded in the manner set out in Kollette v. Siebel and Bateman v. Ramsey. The attachment, as appellant views it, is absolutely both void and fraudulent, and he was justified in proceeding in the United States District Court, and that court had jurisdiction to try the case because the Collin County Court had never brought the res within its custody or jurisdiction.

CONCLUSION.

In conclusion, the appellant desires to quote from Collier on Bankruptcy, 9th Edition, pages 268 to 272, in reference to suits or proceedings in which stay may be granted.

"The general rule is that the court that has acquired jurisdiction of the res will retain it. If the property has come into the possession of the bankrupt court any suit or proceeding tending to interfere with such possession may properly be stayed. Thus, a Federal Court will restrain a replevin creditor proceeding in a State Court against property in the custody of the Federal Court, but will refuse a stay in most cases where the State Court is in possession, or where the bankrupt had no legal or equitable title to the property sought to be replevied. But the rule yields, however, where the possession of the State Court is (1) the result of a fraud on the law, or (2) of a lien declared void or voidable under the law. But if the lien is by a judgment creditor's suit begun more than four months before the bank-

ruptcy, a stay will not be granted. Where a proceeding was commenced long prior to the proceedings in bankruptcy, and the property in controversy was under the control and in the possession of a receiver appointed by the State Court, a bankruptcy court cannot enjoin the proceedings or order the property turned over to the trustee in bankruptcy. A distinction is drawn as to the power of a bankruptcy court to enjoin proceedings of long standing in the State Court, in which such court has acquired complete jurisdiction of the person and property of the bankrupt before the bankruptcy proceedings were commenced and the power to enjoin proceedings instituted within four months of the filing of the petition in bankruptcy. In the latter case the power is properly exercised. Where before filing a petition against an involuntary bankrupt, a creditor brings an attachment suit in a State Court and such court acquires jurisdiction of the property attached, such suit should not be stayed. But if the property sued for was not claimed by the bankrupt, nor included in his schedule, the bankruptcy court has no jurisdiction to stay a suit brought in a State Court to recover the property from one who claimed to have purchased it from the trustee.

"**Proceedings to Enforce a lien**: Stays of proceedings to enforce liens are usually sought to prevent either (1) the enforcement of an execution or an attachment levied within the four months period or (2) the foreclosure of a valid mortgage. In the former, there seems little doubt about the power to halt the lien creditor or of the wisdom of exercising it. If the latter, while the power exists, the mortgaged premises being in the custody of the court, yet, provided the mortgage is valid,

it will not as a rule be exercised, and certainly not unless it appears that the equity of redemption vested in the trustee is of some value. The decisions under the former class of cases are fairly uniform, and where there is a difference, now that the doctrine of Bardes v. Bank has been eliminated, turn, as a rule, on whether the action sought to be stayed is based upon a transaction which is void or voidable under the present law. Those under the latter class declaring against the exercise of jurisdiction to stay the foreclosure of a valid mortgage, and remitting the party who seeks the stay to the State Court, are equally uniform, and the earlier cases contra are no longer controlling. Nor was this latter result appreciably affected by Bardes v. Bank. However, in extreme cases, such as was in re Sabine, and in cases where the mortgage itself is voidable under the terms of the law, the right to stay will usually be exercised. A stay of a sale of real property seized under a judgment rendered in an action to foreclose a mortgage prior to the four months before the filing of the petition should not be granted. Where the lien creditor voluntarily makes himself a party to the proceedings, as when he appears at the first meeting and asks that his security be ascertained for the purpose of voting on that part of his debt which may be unsecured, the rule is, of course, different. Such a creditor may later. But not, if the suit is a creditor's bill of long standing. It will be noticed that under Section 11-a a suit only may be stayed which rests upon a claim from which a discharge would be a release. It should be further noticed that the suit does not in any way affect a lien upon the bankrupt's property; it does not affect any suit maintained by a secured

creditor to enforce a lien thereon. In recognition of this principle, a suit to enforce a mechanics' lien against real property of the bankrupt will not be stayed and such a suit may be brought against the trustee without leave of the court. Where distress has been made by a landlord and afterward the property has been transferred to another person who becomes a bankrupt, the result is to place the property under the control of the bankruptcy court, and such court may restrain further proceedings under the distress. While courts of bankruptcy may, in the exercise of the discretion conferred by this section, stay proceedings where the property is in possession of an officer of a State Court under a levy, yet such stay should not be granted unless the bankrupt's estate will be benefited thereby; if the property subject to the lien is insufficient to satisfy it, there will be no advantage to the general creditors from administration in bankruptcy, and the State Court should be permitted to remain in possession."

We think the above, supported by the numerous authorities cited by the author, is the law on this subject. There is no question but that if the property embraced in this suit had come into the possession of the State Court, or was held by a valid writ of attachment filed more than four months prior to the filing of the petition in bankruptcy, then, in that event, the United States District Court for the Southern District of Texas would have no jurisdicion, but appellant's petition is predicated upon the facts; first, that there was never any valid attachment; that the attachment, such as run, was void under the laws of Texas, and was so as a matter of record, and was such a proceeding in attachment

as had no binding effect whatever upon the trustee. Second, if there ever was a valid attachment, same was waived and released by the agreement under date of December 22nd, 1916. If such be the facts then undoubtedly the State Court never acquired jurisdiction of the subject matter, and if it did, same was released by the voluntary act of the litigants. Therefore, the appellant undoubtedly sought the proper forum to recover the property for the benefit of creditors of the bankrupt estate. Inasmuch as the State Court did not have jurisdiction of the subject matter, said subject matter was to be recovered from the appellee, Adams, if the appellant could bring his suit within either Sections 60-b, 67-e or 70-e.

In consideration of the premises, the appellant, J. D. Collett, trustee in bankruptcy of the estate of Ford C. Cotten, prays that the order of the Court dismissing the bill for want of jurisdiction be reversed, and that the case be remanded with instructions to said court to hear and determine same.

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